

Lex Terra

News Updates on Environmental Law

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“The environment is where we all meet; where all have a mutual interest; it is the one thing all of us share.”

—Lady Bird Johnson

“Lex Terra is an initiative by the members of Centre for Environmental Law, Advocacy and Research (CELAR) of National Law University. Through Lex Terra, we are making an effort to put forward the various facets related to Environment from different sources which is published every fortnight among the society so that a community of environmentally conscious people emerge out of the legal and non-legal fraternity.

Each edition of Lex Terra highlights some noteworthy eco-news, both at global as well as national arena.

This newsletter is extensively prepared by the members and researchers of CELAR, the members of NLUA.

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About CELAR

The primary mission of Centre for Environmental Law, Advocacy and Research (CELAR) of National Law University, Assam is to engage in advocacy and research on public interest environmental issues. For the purpose, it will organize workshops and seminars to educate and develop skills, convene conferences to promote exchange of ideas, conduct training programmes for capacity building in environmental law issues, undertake research on legal concerns and publish

periodically, newsletters and journals.

The objectives of the CELAR are as follows:

- To inspire and educate students by providing hand-on advocacy experience and direct exposure to the issues.
- Strengthen access to justice by undertaking high quality multi-disciplinary research on contemporary legal issues pertaining to environment.
- Advocate for reforms in environmental law through

scientifically sound legislative proposals.

- Organise training programmes for strengthening the legal capacity building on environmental laws do civil servants, law enforcement authorities, non-governmental organizations and media personnel.
- Publish periodically journals and newsletters on environmental law.

— **Professor (Dr.) Yugal Kishore,**
Centre Head, CELAR

Message from Team *Lex Terra*

Dear Readers,

It is with much joy and anticipation that we present to you the fifteenth issue of CELAR's fortnightly newsletter, *Lex Terra*.

We congratulate the team for its continuous and praiseworthy collective efforts.

The team of *Lex Terra* wishes to thank all of those who supported this initiative. We would like to express our gratitude to our respected Vice-Chancellor, Prof. (Dr.) Vijender Kumar for his continuous support and timely inputs. We would like to thank Prof. (Dr.) Yugal Kishore, the Centre Head of CELAR for his help and encouragement. We would like to thank Mr. Chiradeep Basak, Centre Coordinator of CELAR, who has been a source of inspiration from the outset, along-side his unrelenting contribution to all phases of the job, from planning, to setting clear goals and appraising the outcome. Lastly, we would also like to extend our gratitude to our faculty advisors, Ms. Shannu Narayan and Mr. Nayan Jyoti Pathak for their ideas and relentless support.

Based on our publication's impact factor as well as some requests and suggestions by academicians from other law schools, we have decided to share our publication with all law schools, administrators along with a pool of eminent environmental activists, researchers and lawyers in India and overseas. Since we are not having triskaidekaphobia, we are also accepting contributions from all over India. **So if you are willing to be part of this venture, kindly contribute.**

Our issues go online every 1st and 16th of each month.

Please keep pouring down your support and concern for mother nature.

Thank you

Happy Reading!



THE BASEL CONVENTION: A CONVENTIONAL QUANDARY

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In the face of a wrathful nature, countries across the world have adopted treaties to embrace guardianship. It can be argued that many treaties suffer from flaws in their very conception, their neutrality is compromised. The Basel Convention prime among these is misaligned with India's national interests. There is cause for significant retooling towards equality and efficacy. How and why of the Basel Convention is thoroughly explored and settling conclusions reached.

What is The Basel Convention?

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, commonly known as the Basel Convention, is an international treaty which aims at restricting the movement of hazardous waste between the north-south divide. Another aim is the preservation of the environment, reduction in generation of toxic waste and environmentally prudent disposal of dangerous wastes.

The Convention came into force on 5th may 1992. As of January 2015, the Convention includes 182 states and the European Union, the notable outlier being the USA. The Basel Protocol on Liability and Compensation for Damages, currently has been ratified by 13 parties and has not come into force.

Origins of the Convention

The need for the Basel Convention arose in the late 1970s when the existing environmental laws turned austere in the developed countries and disposal costs rose significantly. Concurrently, international shipping became dramatically more accessible due to technological and political advances in international integration, transboundary movements ease and the hunger for foreign currency by the less developed nations lend itself to rapid growth of waste trade.

The world realized the consequences through events such as the khan sea waste disposal incident wherein the crew dumped over 4000 tons of incinerated ash on a Haiti beach under the pretext of fertilizer.

Operation Committees

It was created under the rubric of the UN environment programme and operates through the following:

- A technical working committee whose main function is to deliberate upon the subject matter of the multi-lateral accords.
- A secretariat to synchronize the operations of the convention
- Conference of parties; governing body of the convention

The main tool in the Conventions arsenal: The PIC process

The Basel Convention's pith and core is the prior consent system. This requires transmission of relevant information by the exporter country to the country who is importing the waste. There is also an obligation imposed on the exporter country to only export the waste if it has reason to believe it will be disposed off in a reasonable manner. Exception: Trade is allowed to a competent country if sound techniques are not available domestically. There is a general hazardous waste trade between parties and non-parties. The mandate to limit transboundary movement of hazardous cannot be definitively said to have been achieved through this measure. However, it certainly helps exercise control over the previously unregulated trade. If properly implemented, it should enable developing countries to prevent exploitation at the hands of the developed states and encourage environmentally sound disposal of wastes. However, in practice there are gaps in the institutional capacity of the developing countries to achieve the intended benefit of the PIC process, poor-quality decision making can undermine PIC.

The Basel Ban Amendment

The Basel Ban Amendment, proposed in 1995, is currently not under force, it has been ratified by 85 nations.

The Basel Ban Amendment has been pursued for more concrete and realistic measures.

Should the Amendment come into force, OECD nations would be prevented from exporting hazardous wastes including e-waste to developing countries. However, such a ban is clearly a trade restriction and in contravention of WTO (discussed further below) although no such issues have been raised by any nation. Besides, a potential conflict with the WTO, a complete ban is also subject to a state's ability to control and mitigate illegal trade, which in the case of India has proven to be minimal.

Article XX of GATT - To Ban or Not to Ban?

Article XX seemingly permits serves to legitimize the Basel Ban's proposed restriction on trade. Clause (b) states that countries may permit trade prohibitions in case they are "necessary to protect human, animal or plant life or health". However it is important to note the spirit of the WTO. The ruling in the tuna dispute case between Mexico and the United States of America brings out the same. The latter prohibited imports of tuna from Mexica caught in purse-seine nets on grounds that it was lethal to dolphins. The GATT committee ruled that a trade ban discriminated on the production methodology instead of the traits of the goods. GATT also ruled that the US could not use unilateral trade bans to force other nations to adopt specific regulatory policies. The Basel Convention clearly seeks to impose policies of Annexure VII countries on all non-Annexure VII countries. GATT also clearly states through Annexure XI that trade bans are generally not permitted. A country that voluntarily seeks to

import or trade in waste for the purposes of recycling or final disposal, with full disclosure of facts during the transaction, will be economically disadvantaged by the trade ban. Further, the trade ban affected by the Basel Ban Amendment does not affect Annexure VII countries, which are permitted to trade in hazardous wastes with each other. This is clearly a discriminatory trade practice as defined by the WTO. The WTO states that such trade bans should apply to all countries in a non-discriminating manner.

Effect of the Convention on Technological Development

The development of technologies to increase waste recovery (or for that matter development of technology per se) is linked to the availability of the resource on which the technology is applied. The ban on access to recyclable waste materials under the garb of being hazardous will restrict access of such waste in developing countries while increasing access in developed countries. Developed countries by virtue of their own environment laws will not be able to export the waste. Domestic environment laws will render recycling an unviable business.

Consistency vis-à-vis free trade, a critical appraisal

- Discriminatory outcomes of domestic law compliance.
- Pursues trade bans and sanctions.
- In contempt of sovereignty of the south economic divide.
- Allows individual agreements for trade in hazardous trade between members,

with the only criteria being passing the eco management standards. Contravenes the principal of disposal in the polluter's backyard. Moreover, standards are set by Annexure VII states.

- Allows agreements between states under other treaties to avoid the general prohibition, the US is a prime example, doesn't play by the Basel rule book and yet exports to least developed countries.

Case Study: Ship Breaking (Alang, Gujarat)

Alang is a small town in the Bhavnagar district in Gujarat. Its defining trait is the use of its beaches for ship breaking, for which it has turned into a major port for such operations. The ports at Alang handle roughly half of all ship recycling in the world. The shipyards are situated on the Gulf of Khambat. It is considered the world's largest graveyard of ships.

The hazardous waste generating ship-breaking industry is already known to have a higher accident rate (2 workers per 1,000) than the mining industry (0.34 per 1,000). This is considered the worst in the world, and 16 per cent of the workers here are suffering from asbestos related diseases. The court orders have been baffling and inconsistent.

Economics of ship recycling

The determinants of the price of steel obtained via ship breaking are as follows:

- Oversupply exceeding demand in the global shipping industry.
- Supply of input costs for domestic industry for steel production.

Worker shifts at Alang last for about eight hours, the average wage per shift is Rs 100-200. This

is on par with industrial wages. The ship disposal industry provides employment to about 40000 workers directly and supports over half a million workers indirectly.

Steel economy vis-à-vis ship breaking

- India houses a number of re-rolling mills that produces steel. The ship breaking industry constitutes a major part of their supply of raw material namely scrap steel.
- Over 70% of the “total light displacement onnage of a ship broken constitutes of re-rollable scrap.
- Producing 2 million tonnes of steel via ship disposal totals about Rs 300 crores whereas alternative routes cost Rs 6000, it also doesn't generate appreciable quantities of solid waste.
- Cost savings for the west coast, Alang is their only steel source enabling them to save on transportation costs.

Alang and the Basel Convention - An Illustrative Timeline

In a court order dated 5th may 1997, the Supreme Court declared that no authority shall be allowed to permit import of hazardous wastes that have been banned by the Central Government or by any order of any other court or any other authority or prohibited under the Basel Convention or banned thereafter with dates specified within the order. The Supreme Court directed the concerned state governments to show grounds for the continued existence of sites involved with the usage of hazardous units without

the required safe disposal facilities.

In an order dated 4th August 1997, the Supreme Court noted that the state governments had not complied with the previous order to produce before the court the relevant material sought even after lapse of a considerable period of time. Under this backdrop the decision was taken on 13th October 1997 to establish a high power committee furnished with the requisite personnel to stem further growth of the issue.

In the subsequent court order dated October 14, 2003 the court stated the Hazardous Waste Rules 1989 had not been given due importance and care. The court observed that the material on record demonstrates that proper attention was not paid by the concerned authorities in implementing the Hazardous Waste Rules 1989. This Rules was amended with effect from 6th June, 2000 and further amended on 23rd May, 2003. The problem is not as much of absence of the Rules as it is of implementation. If the Rules are amended, but not implemented, the problem would not have been as grave as faced now. Likewise, if the Rules as amended in the year 2000 were implemented, the same remain on paper. If Hazardous Waste Rules as in 1989 had been properly implemented, the problem would not have been as grave as it is presently.”

More recently the erstwhile Exxon Valdez, renamed the oriental nicety was given the green light for dismantling by the Supreme Court on July 30, 2012. In allowing its breaking at Alang the Supreme Court continued the tradition of disregarding its own previous orders, in this case,

orders dated May 3 and July 6 2012, dealing with imports of hazardous end-of-life ships and ship breaking respectively. The CPCB, GMB, HPC (High Powered Committee) and the MoEF&CC were all desirous of decontamination of the nicety before its arrival in India. Similar to previous cases, prior notice wasn't issued by the exporter country, though in this case this was literally impossible since the nicety was flagless at the moment of its arrival, its Sierra Leone certification having been expired. Proper stock of the inventory wasn't taken either to determine if it was hazardous.

The judgement pronounced in the legal challenge initiated by the Toxics Watch Alliance against the government is a mixed bag, The court observed the in all future cases of a similar nature, the concerned authorities shall strictly comply with the norms laid down in the Basel Convention or any other subsequent provisions that may be adopted by the Central Government in aid of a clean and pollution free maritime environment, before permitting entry of any vessel suspected to be carrying toxic and hazardous material into Indian territorial waters.”

On 8 Jan 2016, a ship called the Horizon Trader, sailing under the flag of USA was beached at Alang. The ship, a property of Matson, was acquired when it bought the Horizon Lines. According to the sale contract it was to be responsibly disposed of in the USA and was sold to all-star metals based in Texas. However, instead of scrapping it in an environmentally green manner, it was sailed to Alang, where it arrived on 8th December 2015 and was beached.

Conclusion

Key issues

- Who is accountable for the hundreds of thousands of jobs that would be affected by reduction in activity at Alang alone? Has their interest been lost among the green rhetoric? What about the steel derived from ship breaking, especially as regards the west coast cost savings due to reduced transportation expenses since Alang is the only source for the area?
- Retardation of suitable green technologies for disposal, is it an acceptable cost for eco protection?
- Since the recycling industry is primarily concerned with lead, zinc, waste oil and ship disposal at Alang, should the Basel Ban come into force which could spell economic disaster for the recycling industry, something that should have already occurred under the Convention but is held in abeyance lack of political will. How should the government reconcile eco protection with economic advance and employment?
- Under pressure from the powerful lobbies, the government has failed to strictly implement the Basel Convention and to exercise its right to re-export ships that threaten the local ecology. Interference in compliance from powerful corporate remains a vexing matter.
- Discriminatory practices and inclusions

within the Convention, is it just a tool to assuage the fears of environmentalists?

- Should India support the Basel Ban Amendment, even though it is not compliant with the spirit of WTO and almost certainly be ineffectual owing to black market trade, besides wreaking economic havoc?

Potential Redressal measures

It is clear that the government faces big policy decisions. Unfortunately, there doesn't seem to be a decisive black or white answer. However, this isn't an isolated predicament without precedent and as such the following might produce a prudent response:

Denouncement of the Basel Ban Amendment

- Push for major retooling of the convention, to better represent the developing world's interests and takes into account the various issues outlined, to favour market measures and economic development to foster eventual eco-friendly practices failing which the status quo would continue to favour economic development and mandate;
- Measures that operate through trade and prices to germinate proper circumstances for human safety and environmental protection whilst maintaining adherence to the convention in name only.

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ENVIRONMENTAL PROTECTION SCHEMES UNDER THE 12TH FIVE YEAR PLAN (2012-2017)

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Over the years, global and national awareness regarding the environment has become an issue of much concern amongst environmentalists as well as the general public. The unsustainable nature of sustainable development itself has come to the forefront and with that, so has the need to revise existing and carefully considering upcoming environmental legislations in India. Keeping this in mind, the Government has introduced several provisions relating to protection and prevention of exploitation of the environment in the 12th Five Year Plan (FYP) introduced in 2016. As we have gradually realised that the notions of 'development' and 'economic growth' are inconsistent with the ecological limits of Earth. The persistent endeavour of the nations to achieve prescribed economic growth rates have led them to forsake its natural resources and in the process cause an ecological disbalance which has the potential to cause life-threatening consequences for humans as well as other life forms. For the record, in 2014 the Environmental Performance Index developed by the United Nations to supplement the Millennium Development Goals ranked India at 155th and in consequence thereof, considering the poor condition of India's environmental regime and the implementation process, this

approach paper has been drafted to address a number of issues ranging from problems such as water scarcity, soil degradation, rain water harvesting and non-enforcement of clearance provisions for development projects. This paper also emphasizes upon a number of steps to tackle these environmental issues viz rainwater harvesting and ground water recharge, assistance to rain fed farming, reduction of freshwater use in cities by enhancing recycling and reviving traditional water bodies, more sustainable methods in agriculture including ecological fertilisation and non-pesticide management.

The 12th FYP Approach Paper of the Planning Commission discusses 12 strategy challenges, 'Managing the Environment and Ecology' being one of the strategy challenges under the draft. The five key components which have been identified to address the issues are:

- a. Land, Mining, and Forest Rights;
- b. Mitigation and Adaptation Strategy for Climate Change;
- c. Waste Management and Pollution Abatement;
- d. Degradation of Forests and Loss of Biodiversity; and

e. Issues of Environment Sustainability.

The Draft initially recognises a few general expectations of the public from the environment; it includes access to clean water, air and soil. It further recognises the right to natural resources, sustainable livelihoods and healthy surroundings. The general suggestions detailed under the draft concentrate upon Government policies and legislations, both national and international, institutional mechanisms, infrastructure, and science and technology in management of Environment and Ecology and specific suggestions with respect to the five given components. The paper adopts a holistic and integrated approach for the management of environment, and to take up schemes to improve trading in air and water pollutants in industrial complexes. Moreover, it recognises emerging areas for new legislations under multilateral environmental regimes and the need to review the body of existing legislations. Another important aspect of India's environmental regimes is to ensure accountability of concerned levels of the Government implementing existing legislations. In order to bring about these changes, it is pertinent to promote research and use of information technology, consequently bringing about transparency in the system. The process of rejuvenating the natural resources of country can be achieved through the process of effective restoration of open and degraded forests, wastelands and urban areas, performance monitoring, setting-up of regional databases on local natural resources, make attempts to oblige with India's international commitments under

various International Conventions. Over and above that, considering India's position in South-Asia, the 12th FY Plan focuses on the leadership role for India in SAARC, ASEAN and SACEP. It shall act as the repository of information and help develop mitigation measures against disasters.

SPECIFIC SUGGESTIONS:

Land, Mining and Forest Rights

1.1 Land Management

The approach paper carries an important suggestion, which is to include Conduct Cumulative Environmental Impact Assessment (EIAs) for vulnerable regions and carrying capacity studies in select river-basins. Cumulative impact is defined by US Council on Environmental Quality as "the impacts on the environment that result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions (RFFA) regardless of what agency undertake such other actions." Other suggestions address several other aspects such as; a national policy for land development, modification of existing policies in respect to energy, raw-materials etc., adapt pre-existing remediation techniques for de-contamination of contaminated sites.

1.2 Mining

Mining is single headedly responsible for various causes of environmental degradation. Mining often leads to imbalance of the ecosystem such as soil erosion, loss of habitat for wild animals, affect on the regional flora and fauna, lack of rainfall etc.

Therefore, in order to negate the effects of mining, the Plan seeks to introduce effective land management schemes to restore degraded lands and to promote effective and efficient recycling of metals through the adoption of modern technology. But even after the introduction of regulation on mining, these regulations have failed to control illegal mining activities throughout the country. Consequently, the Plan addresses the need to take action in order to check illegal mining activities. In the recent times, it has become indispensable for the concerned Governments to prevent illegal smuggling of natural resources and also the hunting of animals for various purposes. In order to give effect to the legislations and schemes as provided under this paper, it is necessary to properly implement the existing rules and regulations and also set up machinery to effectively prosecute violators and in the process, prevent the violation of environmental laws across the country.

1.3 Forest Rights

The recent upsurge in development projects have lead to a direct effect on the rights of the forest communities, wherein some of the projects have directly lead to displacement of tribal communities in different regions across the country, thereby causing an adverse affect on their right to livelihood. Under the given circumstances along with the realisation of the need to protect the interests of indigenous communities, the approach paper provides for the review of existing compensatory schemes and introduces Payment for Environmental Services (PES) schemes. It also

prescribes for proposals to eliminate the poaching of flagship species like tiger, rhino, elephant etc. Human-wildlife conflict and illegal trade of wildlife products also form important aspects of the scheme. But most importantly, it provides that under the PES scheme, locals will be paid to conserve and manage the resources which form a significant step under the broader motive of inclusive growth. The locals possess the best knowledge of the terrain and the species of wildlife and other resources found in the regions, therefore, inclusion of locals in the process of preservation forms a vital step in the process of conservation.

Mitigation and Adaption Strategy for Climate change

Since the advent of industrialisation, the ever-increasing amounts of pollutant either, dumped into rivers or released into the air has gradually taken a toll on the environment and climate change is a direct consequence of such practices. Thus, climate change has now become an issue which requires immediate action in order to prevent it from exceeding beyond threshold capacity. The initial step to be taken in order to deal with the issue of climate change at a national level is to initiate a State Level Action Plan for Climate Change (SAPCC) within a given time frame. In this process, two key challenges have been identified: firstly, the involvement of State Governments in implementing the National Action Plan for Climate Change (NAPCC), and secondly, to achieve low-emission sustainable development growth model through a voluntary involvement

approach. Further, the strategies of the National Disaster Management Authority need to be modified to address pre and post disaster migrations.

Waste Management and Pollution Abatement

The approach paper seeks to encourage recycle, reuse, reduce and remanufacture from waste materials. It provides that incentives need to be provided to public-private partnership for creating the required infrastructure for setting up of treatment Storage and Disposal Facilities (TSDF) for hazardous waste management, segregation of bio-medical wastes, recycling facilities for E-Waste, Municipal Solid Waste segregation, collection and setting up of facilities for complete disposal across the country. With respect to water environment, the key challenge arises in trying to maintain acceptable water quality and quantity are: pollution and overuse, indiscriminate use of wetlands/lakes, agricultural run-offs as residual fertilizer, pesticides and feedlot water. In an effort to minimize its effects on water the following measures have been suggested; increasing efficiency of sewage treatment plants, clean critical rivers state wise and all polluted rivers by 2020, no net loss of wetlands should be set as a target, a National Action Plan to remediate contaminated sites.

CONCLUSION:

While the 11th Five Year Plan draft issued by the Planning Commission addressed the issue of 'inclusive growth', it has taken a further step towards inclusion of the marginalised and

indigenous by people adopting the title 'Faster, More Inclusive, Sustainable Growth'. Yet, the draft suffers from a number of shortcomings. The primary cause of concern for environmentalists arises from the incessant craving of new world economies to attain the much coveted 9%-10% annual growth rate. But this raises the question on whether the concept of 'sustainable development' in itself is oxymoron in nature. Economists all over the world have slowly started to accept that growth essentially is not an adequate indicator as to the betterment in the basic quality of life of the people, better living conditions, sufficient amount of food. On the contrary, it may often lead to diminishing standard of life, loss of habitat for indigenous people, or equal and secure conditions of life. In spite of the shortcomings, I would like to focus on the positive developments the draft seeks to achieve and fulfil.

The approach paper explicitly deals with specific issues of land, mining, and forest rights, mitigation and adaptation strategy for climate change, waste management and pollution abatement degradation of forests and loss of biodiversity, issues of environment sustainability. It further provides establishment of Conduct Cumulative Environmental Impact Assessment (EIAs) for vulnerable regions and Carrying capacity studies in select river-basins, and with respect to forest rights and acquisition of land for developmental purposes, the paper seeks to modify existing compensation schemes and introduces payments for Environmental Services (PES) schemes. As has already been discussed, climate change is an issue of much contemporary interest and therefore, a State

Level Action Plan for Climate Change (SAPCC) within a given time frame has been prescribed. And it also provides incentives to public-private partnership for creating the required infrastructure for setting up of treatment Storage and Disposal Facilities (TSDF) for hazardous waste management. Various measures have been discussed under the draft in order to tackle the impacts of human activities on nature and more importantly to revive what has been lost in the process, and to protect the environment from any future damage under the pretext of development. Though the draft has its own short comings but it can also be seen as a stepping for future consolidation of environment laws and further strengthening of the environmental regime in India.

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Oirfanhasieb

PERMISSION TO USE THE YAMUNA FLOODPLAINS FOR PRIVATE USE: THE PRINCIPLE OF ‘POLLUTE AND PAY’

Gayatri Raghunandan

In the case of the celebration of the controversial World Cultural Festival on the endangered banks of the Yamuna, the National Green Tribunal permitted the Art of Living Foundation to go ahead with the event, by paying Rs. 25 lakh out of the Rs. 5 crore imposed on them, as an interim compensation. This order of the NGT goes in contravention of their judgment in the matter of *Himmat Singh Shekhawat v. State of Rajasthan* where the court prohibited any developmental activity and construction in the floodplains, and had approved an expert report for the restoration of the floodplains. As a result, the delicate ecosystem of the Yamuna has suffered irreparable loss of bio-diversity, with major damage to 50-60 hectares of wet lands due to the flattening of the plains. In this context, the Principles of Polluter Pays and Proportionality hold great significance.

It was Principle 16 of the Rio Declaration, 1992 which was the first to introduce the ‘Polluter Pays Principle’ (PPP) as an essential feature of sustainable development by declaring that, “National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of

pollution, with due regard to the public interest and without distorting international trade and investment”. In India, it was the Oleum Gas Leak case, which introduced the principle to Public Interest Litigation, where it was ruled that, “The measure of compensation in such kind of cases must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in carrying on of the hazardous or inherently dangerous activity by the enterprise”. This principle was further shaped by the 1996 judgment in the Bicchri village case, where it was ruled that “Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on”. This observation was reiterated in the ruling of the Vellore Citizen’s Welfare Forum case of 1996, where the court ordered polluting tanneries in five districts of Tamil Nadu to set up Individual Pollution Control Devices, apart from paying compensation to those affected as well as the cost of restoring the damaged ecology.

The PPP is complemented by the Proportionality Principle and the Precautionary Principle, all three of which have been seen to be facets of a balanced approach to reverse and compensate for environment damage. The aforementioned principles also receive backing in the form of Section 20 of the National Green Tribunal, 2010, which lays down that, “The Tribunal shall, while passing any order or decision or award, apply the principles of sustainable development, the precautionary principle and the polluter pays principle”. In the current case, the expert committee set up by the National Green Tribunal to investigate the matter estimated that the damage caused to the Yamuna flood plain was likely to cost Rs. 100-120 crore. It recommended that this be recovered from AoL in accordance with the “polluter pays” principle, along with cancellation of the event and payment of reparation costs. However, by calling the event as ‘fait accompli’, meaning that it could not realistically be stopped, owing to the paucity of time, the NGT slapped a fine of Rs 5 crore. This was met with a public statement by Mr. ‘Sri Sri’ Ravi Shankar, spiritual head of the AoL that he was willing to go to jail, rather than pay the fine. This was followed by an order to pay Rs. 25 lakh immediately and the sanctioning of a three week period to pay the remaining amount.

The current order has also gone against the proportionality principle specified in Section 20 of the NGT Act. A fine of Rs. 5 crore for damages worth almost Rs. 120 crore slapped on a worldwide organisation receiving funding from

many foreign sources as well as the Government of India grossly violates this principle, which is based on the capabilities of the defaulting party to pay compensation. The Polluter Pays Principle has also been reduced to a shameful ‘pollute and pay’ way out of polluting a public resource by exercising private ownership over it. The imposition of a fine for environment damage is an exception to the rule, which is the cancellation of the event. The damage caused to the Yamuna floodplains has also affected landless farmers in the area who lament that it will take them more than two years to make the flattened plains suitable for cultivation again. In such a context, claims made by the AoL Lawyer that ‘Sri Sri’ will set up a bio-diversity park on the plains seem vulgar and mindless. The ongoing ‘repair’ that is being conducting by the foundation post the WCF celebrations can only be considered cosmetic. This coupled with the severe devaluation of compensation award on part of the National Green Tribunal have severely affected the regenerative capacity of the already exploited Yamuna floodplain, which may or may not survive as long as one may expect.

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- *Indian Council for Enviro-Legal Action v. Union of India* J.T. 1996 (2) 196
- *Vellore Citizens Welfare Forum v. Union Of India & Ors* AIR 1996 SCC 2715
- *Durga Dutt and Ors. v. State of HP*, APPLICATION NO. 237 (THC)/2013, 6/2/2014, para 19:
 “The Polluter Pays principle, the Precautionary Principle and the Principle of Proportionality could be applied as facets of the said balanced approach. Irretrievable damage to the environment is not acceptable. The legislative intent behind the Act of 1986 evidently demonstrates this principle. It is a general legislation for environmental protection, as there were uncovered gaps in areas of major environmental aspects and hazards in the existing laws”
- Nitin Sethi, Permissions given to Sri Sri Ravi Shankar's Art of Living mega event were vague (March 9, 2016), http://www.business-standard.com/article/opinion/permissions-given-to-sri-sri-ravi-shankar-s-art-of-living-mega-event-were-vague-116030801038_1.html
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- *M.C. Mehta v. Kamal Nath & Ors* (2000) 6 SCC 213:
 “Public Trust Doctrine: The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes.”

THE WTO RULING AGAINST INDIA - IS IT TIME TO RETHINK INTERNATIONAL TRADE VIOLATIONS IN THE FACE OF CLIMATE CHANGE.

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Introduction

The WTO in its recent ruling against India's Domestic Content Requirements (herein referred to as DCR) of India's National Solar Mission in a move by the United States has opened up the debate about domestic energy security, cost of procurement of renewable energy and most importantly the framework of existing trade agreements to recognize the capacity of developing countries to build a cordial relationship between trade and environment. The Jawaharlal Nehru National Solar Mission of India has set ambitious targets such as deployment of 20,000 MW of solar power by the year 2020 and one the modalities of execution of these targets are domestic production of critical raw materials, components and products with the objective of realizing solar grid tariff parity (the point of time when solar technology will produce electricity at the same cost as existing traditional technologies). The Mission's eligibility criteria for shortlisting of Solar PV projects requires, apart from other things, project developers to comply with domestic content requirements which states that the cells and modules for such projects to be sourced from those domestically produced in India with the project functioning in its three phased approach.

DCR, the very name of which is normally construed as protectionist measures and a violation of international trade rules, nevertheless have found their position in almost all domestic trade policies in the world including India. DCR operates as either price or feed in tariff based and quantity based mechanisms with the objective of deployment of renewable technology. The reasons for the usage of economic policies with the element of DCR are mainly attributable to the Government's objective of encouraging domestic manufacturing industries to invest in renewable technologies which normally involve high costs and thereby have the potentiality of increasing jobs which will ultimately result in both domestic energy security as well as establish a market presence for the country in a developing global market. The concept of DCR is not a new one and has been in existence for quite some time, with countries implementing the same in various forms, for example in China in the years 1996 to 2000 all wind power projects seeking approval had to source nearly 40 per cent of their content from local manufacturers and countries like Denmark and Germany have also introduced other policy measures to support the domestic manufacturing

industry in the form of low interest loans for projects with high domestic content, alteration of custom and import duties which favour import of components of wind turbines rather than fully assembled wind turbines etc.

Core Findings of The WTO Panel

India and United States are signatories to the WTO agreement. The WTO ruling against India is to a considerable degree based on its ruling against Canada in 2014 which declared Canada's Feed in Tariff program, challenged by Japan to be inconsistent with its international trade obligations. A holistic analysis of the ruling against India can be understood in the light of the three main observations of the WTO Panel. The first analysis was based on the consistency of the DCR measure with Article III: 4 of the GATT (General Agreement on Trade and Tariffs) 1994 agreement and Article 2.1 of the TRIMS (Trade related Investment Measures) agreement which lay down the concept of "National Treatment" of imported goods and prohibits "no less favourable treatment" to such goods.

India's DCR measure was found inconsistent with the above mentioned Articles, in defence of which India claimed the benefit stipulated under Article III:8 of the GATT agreement which lays down that the articles, rules and principles of this agreement shall not affect the procurement by governmental agencies for governmental purposes and not for commercial resale or with a view to use in the production of goods for commercial resale and thereby permits the government to impose subsidies exclusively for domestic

producers as long as they are for the above mentioned purposes. In response to which the Panel reiterated its analysis in the ruling against Canada's DCR in which the Appellate Body held that in order to qualify for the derogation under Article III:8 the government should show that foreign products and the products it sought to buy are in a "competitive relationship" which Canada had failed to do so, as the foreign products that were facing discrimination were electricity generation equipment whereas the product that the government was intending to buy was electricity, similarly India was also held to be unjustifiably discriminating foreign solar cells and modules whereas the product that it was in fact procuring was electricity and therefore there was no competitive relationship between the two which renders it nothing less than an international trade violation.

Secondly, India justified its DCR measure by relying upon the benefit under Article XX (j) of the GATT 1994 under the General Exceptions chapter which allow countries to apply measures that may appear to be a disguised restriction in international trade but are nevertheless enforceable if found consistent with the ten exceptions as provided under Article XX (j), which provides that measures which are intended to procure products which are essential for the acquisition or distribution of products which are in general or short supply. The Panel held the situation mentioned in Article XX (j) of the GATT 1994 applies when the supply of a particular product is unable to meet the demand in the relevant geographical market and do not cover such products which are in risk of short supply and

even such an eminent risk was not demonstrated by India. Lastly, India argued that its DCR measures are justifiable as per Article XX (d) of the GATT 1994, which permits measures construed as disguised restrictions if they are with the objective of securing compliance with “necessary rules and regulations” and in this regard India relied on the obligations under International agreements promoting sustainable development.

The Panel rejected the argument contending such “international agreements may constitute “laws or regulations” within the meaning of Article XX (d) only insofar as they are rules that have “direct effect” in, or otherwise form part of, the domestic legal system of the Member concerned” and India had failed to demonstrate this requirement and therefore declared India’s DCR measures to be violation of its International Trade obligations.

Economic and Environmental Analysis of the Ruling

The ruling of the WTO raised various environmental, economic and legal issues each of which was interpreted by different perspectives. The ruling to a few is economically viable as it has only once again emphasized the importance of free trade even in the case of renewable energy technologies. The WTO’s perspectives on Trade and Environment as enshrined in the Marrakesh Agreement which established it, and the ongoing Doha Rounds considers the opening up of trade and sustainable development to go hand in hand and accordingly do not support imposition of trade tariffs even in the case of environmental goods and services and therefore permits trade related

measures to be adopted by countries to protect the environment as long as they don’t serve any protectionist ends. In terms of Climate Change, the objective of WTO is to bring effective realization of Article 3, Para 5 of the UNFCCC (United Nations Framework Convention on Climate Change) which declares that “measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade” and the WTO is of view that its rules and the principles of UNFCCC concert with each other and cannot work in isolation.

The benefits of free trade are definitely undisputed even in the case of renewable energy technologies as they increase competition, increase better quality products and provide consumers with more choices at lower prices. However, creating a conducive domestic environment for renewable technologies is also of utmost importance especially in a market that is characterized by high costs of production as well as heavy reliance on imports for better quality products as in the case of solar energy technologies. The International Solar Alliance concluded between India and France at the behest of the Paris Conference of parties (COP21) was primarily for the purpose of providing international support for initial public financing in developing countries for faster deployment of solar technologies in these countries. Although the International Alliance is not materially affected by the WTO ruling, it merely reaffirms the need for establishment of strong solar manufacturing units domestically which have been difficult to do so because of cost of financing development of solar

technology. Solar energy in India is at its nascent stage with the rising energy shortage, energy production from renewable sources have been the need of the hour but the challenges that face the solar energy industry do not encourage private players to participate. A perusal of the recently concluded Paris Agreement lays down in Article 9 and 10 the concept of financial and technology transfer obligations of developed countries but the same should operate only through the finances mechanism and technology mechanism as specified in the protocol thereby which climate change finance should be routed only through organizations like Green Climate Fund. A major criticism of the Paris Agreement is that it fails to understand the importance of public private partnership in developing countries in realization of their ambitions of emission reduction targets, which developing countries will not be able to achieve such targets with public finance alone.

Conclusion

To conclude renewable energy policies are increasingly initiated by almost all countries in the world today as the adverse effects of climate change are only increasing. These policies which try to incentivize clean energy transition by creation of strong domestic environment for renewable energy technologies should not be automatically construed as protectionist. Such policies should be analyzed from the both the perspectives as an instrument of climate change as well as reducing domestic economic costs due to shifting to renewable energy.

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VISITING THE DRAFT NATIONAL WILDLIFE ACTION PLAN (2017-2031) [Contd.]

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The 12th Issue of the Lex Terra devoted a section to the Draft National Wildlife Action Plan (2017-2031). The special emphasis of the draft is to rehabilitate the threatened species of wildlife as well as conserve their habitats. This includes the inland aquatic, coastal and marine eco-systems. Three heads namely Strengthening of Protected Area Network, Landscape Level Approach for Wildlife Conservation and Rehabilitation of Threatened Species were dealt in detail. In this issue, the following heads has been touched upon:

- Conservation of Inland Aquatic Ecosystems;
- Conservation of Coastal and Marine Ecosystems;
- Integrating Climate Change in Wildlife Planning;
- Control of Poaching and Illegal Trade in Wildlife;
- Wildlife Health.

CONSERVATION OF INLAND AQUATIC ECOSYSTEMS

Recommended Action and Projects

- Identification of new wetlands of biological/ecological significance by the States/ Union Territories and complete management plans (this should include measures concerning Climate Change Adaptation (CCA) and Disaster Risk Reduction (DRR)) for all protected areas.
- Professional training curricula of all training institutions should include management of inland wetlands.
- Forest Officers should be empowered under the Environment (Protection) Act 1986.
- Various departments and agencies of the government should collaborate for addressing the issues relating to inland wetlands.

Timeline for the Priority Projects are as follows:

1	Review and update the list of endangered and critically endangered species of flora and fauna and complete Red Listing of endemic species.	To be initiated by 2017 and completed by 2020.
2	Conduct status survey of Red Listed and other Data Deficient species and publish reports on their populations, area of extent, causes of threat and habitat.	To be completed by 2021
3	Prepare and execute species recovery plans for the priority species and initiate measures for safeguarding genetically pure populations from future genetic contamination and for phasing out genetic swamping where such swamping has occurred.	To be initiated in 2017 and continue throughout the plan period.
4	Identify suitable alternative homes for species having single isolated populations and prepare rehabilitation plans.	To be completed by 2021
5	Develop a cadre of trained Wildlife Biologists and Botanists and build their capacity in <i>ex-situ</i> conservation / conservation breeding. Develop capabilities of planned breeding and reintroduction of captive bred populations of identified endangered species in accordance with the IUCN guidelines.	To be initiated by 2017 and continue throughout the plan period
6	Develop <i>ex-situ</i> conservation facilities for critically endangered species and initiate conservation breeding programmes.	To be initiated by 2017 and ongoing
7	Develop a centralized database of available information for identified species that leads to their successful <i>ex-situ</i> conservation and restoration in natural habitats.	To be completed by 2018
8	Establish new MPCAs and MPDAs for the globally threatened medicinal plants in different States / UTs.	Initiate by 2017 and complete within 2022
9	Initiate a national programme on inventory and monitoring of threatened habitats and link with conservation of eco-sensitive area programme.	Initiate by 2017 and continue throughout the plan period.

CONSERVATION OF COASTAL AND MARINE ECOSYSTEMS

Recommended Action and Projects:

- Establishing new Protected Areas to protect the range of biodiversity in coastal and marine ecosystems and strengthening their network as well as management throughout the country. This also includes restoration of the fragile marine and coastal habitats.
- Tailoring of the curricula of the professionals (at all levels of responsibilities) in a manner to

meet the management needs of such ecosystems.

- Forest Officers to be empowered under the Section 19 of the Environment Protection Act 1986 to take cognizance of violations for enforcement.
- Various departments and agencies of the government should collaborate for addressing the issues relating to coastal and marine ecosystems.

Timeline for the Priority Projects:

1	Integration of various strategies for CCA, mitigation and DRR for the management of Wetland Protected Areas and coordination among the authorities/agencies responsible for addressing disaster risks at national level, state level and district level and Panchayat Raj institutions for implementation of such responses.	To be completed by 2020
2	Establishment of a team of resource persons and develop training curricula and their administration for frontline staff in the designated training centres of the State Forest Departments and specialized training of Range Officers.	To be initiated by 2017 and to be continued
3	Initiate process to empower forest officers under section 19 of the Environment (Protection) Act 1986 for taking cognizance of violations and further needful.	To be completed by 2020
4	Institutional mapping to ensure that most of plan objectives and strategies are appropriately addressed through arrangements of coordination.	To be initiated in 2016 and continued

INTEGRATING CLIMATE CHANGE IN WILDLIFE PLANNING

Recommended Action and Projects:

- Conducting climate specific research such as assessment of change in species distribution-vegetation including sea grass meadows, ascertaining possible change in marine species form fish landings, change in population sizes, reproduction/phenology, movement patterns, diseases and their frequency
- Integration of issues concerning Climate Change Adaptation (CCA) and Disaster Risk (DRR) Reduction into the Environmental Impact Assessment process.
- A common action plan integrating CCA and DRR with shared responsibility into all sectors needs to be developed wherein the local communities (with regard to their knowledge and capacities) should be actively involved.
- The boundaries of Protected Areas should be rationalized in connection with climate change and anticipatory planting should be ensured along ecological gradients with respect to climate change.

- Promotion of assisted migration of wildlife and undertaking research on animal responses to climate change, use of pesticides, emerging zoonotic diseases, invasive species and the threats of hybridization in order to sketch out suitable adaptation plan.
- Review of the existing Biogeography Report of WII and Management Planning Guidelines of Protected Areas with respect to climate change.

Timeline for the Priority Projects:

1	Assess the impact of climate change in all ecosystems with respect to their ecological services and incorporate the findings in the Management Plans of respective Protected Areas and Tiger Reserves with adaptive or mitigation measures.	To be initiated by 2017 and to continue
2	Integration of the EIA process with the issues concerning CCA and DRR.	To be initiated by 2017 and to continue
3	Conducting a review to harmonize the existing both national and international policies in connection with climate change and impacts in India.	2017-2018.
4	Developing a common action plan integrating CCA and DRR with shared responsibility into all sectors and the state coastal zone management plan required to be prepared under CRZ provisions would pave the way for such synergy, with participation of all stakeholders.	2017-2018
5	Integrate CCA and DRR in all Management Plans of Protected Areas and Tiger Reserves including the Coastal and Marine Protected Areas.	2017 and to continue
6	Rationalization of boundaries of Protected Areas	2017 to 2020
7	Anticipatory planting along ecological gradients	2017 and to continue
8	Assisted migration of wildlife	2017 and to continue
9	Research on animal responses to climate change, use of pesticides, emerging zoonotic diseases, invasive species and the threats of hybridisation so that appropriate adaptation plans are drawn for species and areas.	2017 and to continue
10	Review of the existing Biogeography Report of WII and Management Planning Guidelines of Protected Areas and Tiger Reserves with respect to climate change and rationalize them accordingly.	To be completed by 2020.

CONTROL OF POACHING AND ILLEGAL TRADE IN WILDLIFE

Recommended Action and Projects:

- Capacity building and better equipping of the staff to increase focused crime prevention, patrolling and reporting as well as encourage use of modern technology for patrolling, crime data management, intelligence gathering and surveillance.

- Auditing of protection mechanisms for enhancing efficiency and setting up of Regional Forensic Labs to assist in speedy crime investigation.
- Integrating and involving stakeholders (such as the customs, police, paramilitary, coastguard, postal and courier services and other agencies) that can play a key regulatory role in preventing wildlife offences.
- Enhancing the capacity of all concerned enforcement agencies in India to efficiently implement both national and international laws and policies.
- Establishment of special courts for wildlife crime related cases and promotion of international cooperation to combat organized wildlife control.

Timeline for the Priority Projects:

1	Fill up frontline staff vacancies in State Forest Departments.	To be completed by 2018
2	Enhance the capacity of frontline staff to effectively collect, package and dispatch the samples for further forensic analysis.	To be initiated by 2017 and to be continued
3	Provide adequate logistics with modern communication and equipment, incentives and supports to the frontline forest staff.	To be initiated by 2018 and to be continued.
4	Use mobile technology to develop “Digital field Guides” for easy identification of various wildlife goods and their derivatives.	Initiate by 2018 and to continue
5	Enhance protection activities.	To be initiated by 2018 and to be continued
6	Establish special courts to ensure speedy trials of wildlife crimes.	Complete by 2022.
7	Conduct national level audit of wildlife trade using scientific methods	Initiate by 2018 and to continue
8	Establish State of the Art wildlife forensic laboratory at WII and develop a network of wildlife forensic Laboratories in the country.	Complete by 2022
9	Form special investigation units in Protected Areas with recent and recurrent history of wildlife poaching and trafficking.	Complete by 2022
10	Assess the effectiveness of protection measures undertaken by the State to combat wildlife crime.	Complete by 2022 and repeat every 5 years
11	Ensure operational cooperation and information exchange between various enforcement agencies & set up databank on wildlife crime	Initiate by 2018 and to continue

12	Increase information exchange, at operational level and joint operation in the international borders with neighboring countries to curb trafficking of wildlife goods	Initiate by 2018 and to continue
13	Establish a National Level Wildlife Crime Prevention Committee	Complete by 2020
14	Constitute state level team of experts on wildlife crime to improve crime prevention	Complete by 2019
15	Adopt strict policies to check live animal trade.	Complete by 2020
16	Initiate schemes for the rehabilitation of habitual offenders and traditional hunting communities who are involved in wild and make them part of the mainstream society.	Initiate by 2018 and to continue
17	Develop action plan to use the digital media, celebrity endorsed campaigns and social networking sites to create awareness across the masses about wildlife crime.	Complete by 2020
18	Review the existing Wildlife Protection Act-1972, so that wildlife Crime could be treated at par with the economic offences.	To be completed by 2020
19	Taking special efforts to forge and encourage international partnerships in combating organized wildlife crime.	To start in 2017 and ongoing

WILDLIFE HEALTH

Recommended Action and Projects:

- Conducting research on the ecology of diseases that affect free ranging wildlife.
- Ensuring that wildlife translocations are based on veterinary considerations and not done indiscriminately.
- Establishment and strengthening of centres for wildlife rehabilitation and disease surveillance in and around Protected Areas.
- Development of facilities for rescue and rehabilitation of displaced wild animals and wildlife orphans by setting up mobile units and utilising the services of the newly established wildlife rehabilitation centres.
- Setting up of an immune (infectious disease-free) belt around Protected Areas and other sensitive wildlife areas by vaccinating livestock in the surrounding areas against infectious diseases posing threat to wildlife.
- Commissioning of a national programme to bring both human and animal health sectors in the country together in accordance with the modern paradigm of 'One World One Health'.

Timeline for the Priority Projects:

1	Initiate long term studies to establish the role of infectious or non- infectious diseases as the cause for the decline or fluctuations in wild canid population. Timing: 20017 - 2021 Investigate into the epidemiology and ecology of goat pox reported among the goat antelopes (goral and serow) from the States of Mizoram and Sikkim.	2017-2020
2	Establish a practical and legally binding protocol on the subject of 'captive to wild' and 'wild to wild' translocation operations based on the advice of a committee of experts drawn from the wildlife and the veterinary sciences.	2017-2018
3	Establish well-equipped wildlife rehabilitation cum disease surveillance centers manned by trained wildlife veterinarians in all Tiger Reserves and selected PAs.	2018 onwards and continued thereafter
4	Develop and maintain a national online database on wildlife disease (reports, prevalence and epizootics) using reports coming from various field and regional level surveillance centres.	To start in 2017 and to continue thereafter
5	Make the latest drugs for chemical capture of wild animals available to all zoos and the wildlife rehabilitation cum disease surveillance centres through a central nodal agency.	2017 onwards and continued thereafter
6	Incorporate chapters on the rescue and rehabilitation of displaced wild animals and wildlife orphans in the Management Plans of Tiger Reserves and Protected Areas.	2017 and continued thereafter
7	Establish suitably equipped Mobile Units supported by trained veterinarians in districts having high levels of Human-Wildlife Conflict (HWC) to attend to wildlife emergencies, rescue and rehabilitation, and to provide wildlife health support.	2017 and continued thereafter
8	Initiate orphan animal rehabilitation projects in the States / UTs on the lines of the 'return to the wild' programme in Assam to address the welfare of animals displaced from the wild.	2018-2019
9	Establish a practical and legally binding protocol on the subject of mercy killing and euthanasia of wild animals.	2017-2018
10	Launch a coordinated immunization programme for livestock living in and around TRs, PAs and other sensitive wildlife areas along with a monitoring mechanism in coordination with State Animal Husbandry Departments, local Veterinary Colleges, Panchayats and suitable NGOs.	2017 onwards and continuing
11	Initiate a nation-wide study on communicable diseases among primates living in urban environments in collaboration with the public health authorities and human disease surveillance institutes.	2017-2021