Lex Terra

Centre for Environmental Law, Advocacy and Research (CELAR)
National Law University and Judicial Academy, Assam

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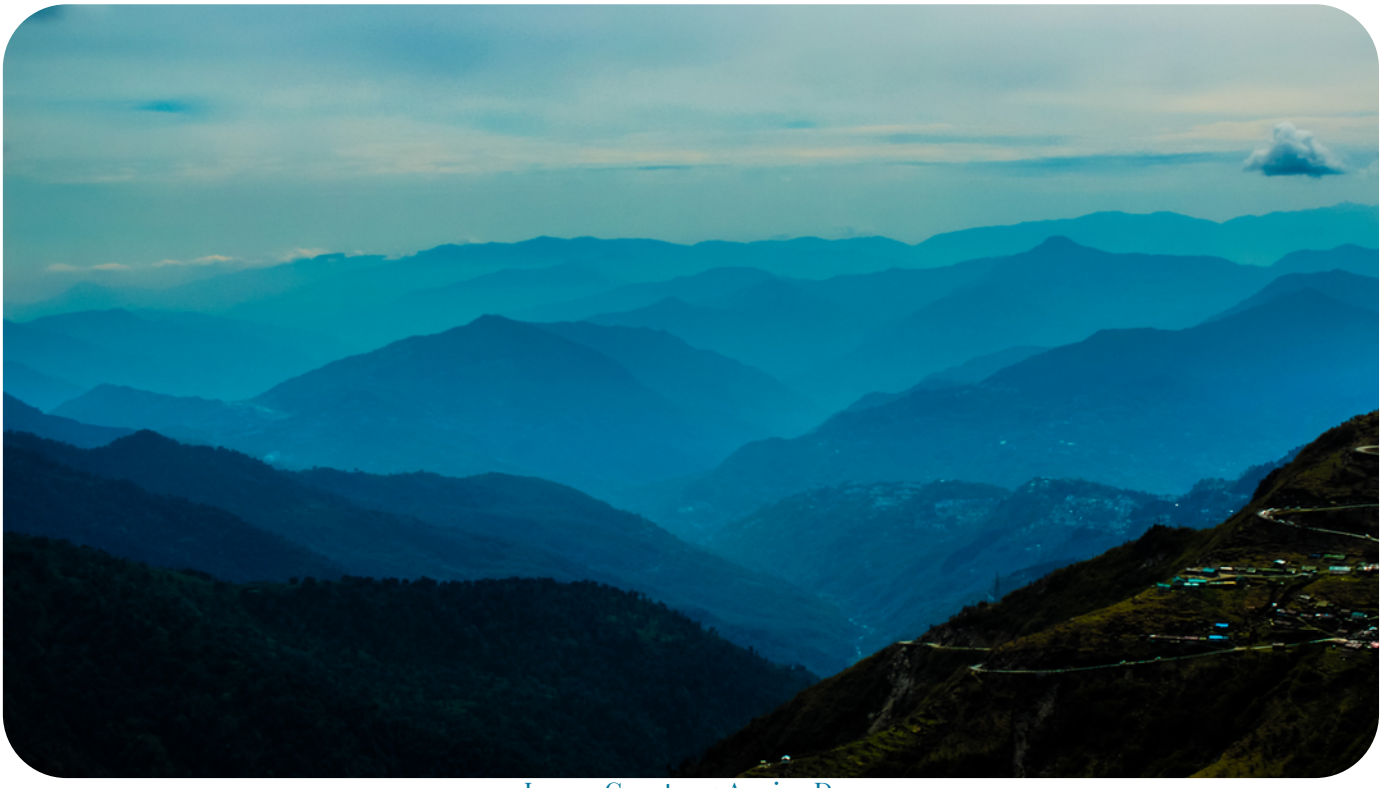

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ABOUT CELAR

The fundamental aim of the Centre for Environmental Law, Advocacy, and Research (CELAR), National Law University and Judicial Academy, Assam, is to participate in advocacy and research on public interest environmental concerns. It endeavours to do so by holding workshops and seminars to educate and improve skills, convening conferences to encourage an exchange of ideas, conducting training programmes for capacity building in environmental law issues, undertaking legal research, and publishing newsletters and journals regularly.

The main objectives of CELAR can be elucidated as follows:

- Providing students with hands-on advocacy experience and direct exposure to the issues to inspire and educate them.
- Strengthen access to justice by conducting high-quality multi-disciplinary research on current environmental legal issues.
- Advocate for reforms in environmental law through scientifically sound legislative proposals.
- Organize training programmes for civil servants, law enforcement agencies, non-governmental organisations, and media professionals to improve their legal capacity on environmental laws and policy.
- Publish environmental law publications and bulletins on a regular basis.

Thus, to meet the last objective, Lex Terra is an initiative undertaken by CELAR. Through Lex Terra, we strive to provide a voice to various aspects of the environment, published quarterly, to create a community of environmentally conscious individuals from the legal and non-legal fraternity. Each issue of Lex Terra features important environmental news from across the world and from within the nation. This bulletin is meticulously compiled by CELAR members and is dedicated to enviro-legal enthusiasts around the country.

MESSAGE FROM THE CHIEF MENTOR

It is, unfortunately, true that inadvertently, we humans are responsible for the deterioration of this planet without recognising the negative consequences of minor things we do to contribute towards its dilapidation. Education and awareness generation can be one of the positive moves to fix the irreparable damage that we have done to our Mother Nature, and in furtherance to such moves, we as a legal institution, are continuously striving to bring environment related news and views for several environmentally sentient readers.

In this context, it delights me to note that the Centre for Environmental Law, Advocacy and Research (CELAR), National Law University and Judicial Academy Assam, is releasing a new issue of its webzine, 'Lex Terra'. Lex Terra aims to be an e-forum that involves, promotes and engages students, scholars and anyone interested in environmental law, to express and share their opinions and ideas. It is our fervent expectation that this webzine will keep providing an academic forum to bring all ecologically conscious minds together to deliberate on environment related developmental decisions.

I congratulate the entire team of CELAR for bringing out this webzine which justifies one of the significant mandates of National Law University and Judicial Academy, i.e., rendering a socially relevant legal education. I appreciate the efforts made by the student editors and peer reviewers in bringing out this webzine. I also bring on record the constant guidance being provided by CELAR teacher members to the students.

I am certain that this modest endeavour of CELAR will continue to stimulate and proliferate enviro-legal awareness.

Prof. (Dr.) V.K. Ahuja,

Vice-Chancellor, NLUJAA

EDITORIAL NOTE

"The world still needs a giant leap on climate ambition".

This was one of the remarks made by the Secretary General of UN, Mr. António Guterres' in his concluding statement at the 27th edition of the Conference of Parties (COP) in Sharm el-Sheikh and the one that particularly managed to strike a nerve in the minds of people. This remark is not just pertinent to the current environmental and climate scenario but it also serves as a laconic reminder to the governments and citizens of the world that the clock is ticking and so is our planet's life support along with it. Ergo if we can't act fast and act impassionately on a community level as a whole then we might be staring at environmental and natural disasters of catastrophic proportions like the recent floods in Pakistan which deluged one-third of the country or the energy scramble that has engulfed Europe because of the ongoing Russia-Ukraine crisis. While these issues are significantly concerning and COP has provided a platform for them to be addressed so that it disseminates to the masses, many similar environmental issues go unaddressed because of a lack of medium through which it can be dispatched. Therefore, through Lex Terra we strive to provide a medium for those issues that can't find their place in the mainstream media or journals so that they don't go unnoticed. And with that, the editorial board of Lex Terra is glad to publish the 40th edition of Lex Terra, which pans the spotlight on environmental issues that, regrettably, don't receive as much attention as they ought to.

The first article in this issue, by Meera Bharathi S, throws light on the exploration of petroleum in the North Eastern region and thereafter the need for regulatory framework that followed for management of the Oil and Gas sector in India. Under the Constitution of India, there are varied provisions dealing with the management of oil and gas resources and in this regard, the author carefully delves into Article 246 and the Seventh Schedule mentioned therein. Other pertinent legislations regulating this sector are also discussed in this article. The

author finally moves on to analyze the possible environmental hazards posed by the petroleum industries, particularly, the contamination of groundwater and surface water. Lastly, the author underscores the importance of switching to green and renewable energy in the light of international as well as national initiatives being undertaken in this direction.

The second article of this issue is a case commentary on M.K. Ranjitsinh & Ors. v. Union of India & Ors., authored by Udit Raj Sharma and Anushka Srivastava. The primary issue encircling the case was the protection of endangered species of birds and finding alternatives to the overhead power lines in the form of underground infrastructure. The authors also referred to multiple reports which highlights the detrimental impact that overhead power lines have had on various bird species. The commentary also involves references to the principles of eco-centrism as distinguished from anthropocentrism, the doctrine of public trust, inter-generational equity and sustainable development principles.

In the third article, authors Arya Mishra and Prachita Agrawal advocate the urgent need to incorporate Ecocide as the fifth International Crime under the Rome Statute. The authors discuss the impact of ecocide borne out of unnumbered human activities throughout history and why the law on Ecocide must be preventive, pre-emptive as well as post-operative so as to prevent this human induced onslaught on the environment and its ecology. Furthermore the article emphasizes on mandating ecocide as a crime of 'strict liability' to negate the use of intent as a legal loophole while mounting a defense. Lastly, the authors weigh on how the inclusion of Ecocide as the fifth international crime will lead to a decline in business activities that severely affect the environment and eventually serve as an effective tool for the transition from an anthropocentric to an ecocentric approach while making laws.

The fourth article by Bhaskar Singh adopts a holistic approach in bringing to light the recent internal factors that highly lead to the imbalance in the overall

environment structural pattern and also reflects the remarkable revolution that the humans have come across in the recent times by becoming a severe threat to the environment. The author with the help of the existing laws and pertinent case laws highlights the key concepts relating to the principles of Agenda 21 and Kyoto Protocol in promoting the Sustainable development goals, evoke a keen sense of responsibility towards safeguarding the affluent biodiversity and catering to the needs of future generation and establish a link between humans and environment by stressing upon the need for an affluent biodiversity.

The authors of the final article, Akash Nath and Ankush Nath, discuss the significant role of arbitration in view of the ever-increasing disputes arising out of climate change. In this article, the authors firstly outline the vast scope of climate change disputes distinctly classified in the International Chamber of Commerce Report and the direct as well as indirect benefits that arise from arbitrating climate change disputes. Several international landmark cases such as Perenco v. Ecuador and Peter A. Allard (Canada) v. Government of Barbados have been highlighted wherein the tool of arbitration was implemented so as to deal with environmental disputes. The authors, lastly, advocate for the need of an International Court for The Environment (ICE) wherein international law can serve to fulfil the demands of environmental protection.

In our final note to all readers, the Editorial Board would like to thank all the authors who have contributed their thought-provoking pieces so far. As the fight for keeping knowledge out of the boundaries of paywalls continues, the Editorial Board also strives to ensure that Lex Terra remains freely accessible and endeavours to license it with the Creative Commons in the near future. We hope scholars, practitioners, academicians and students continue to add to the existing literature on environmental jurisprudence and utilize Lex Terra as a platform to spread awareness on environmental issues requiring immediate attention.

They say that good things take time and we shouldn't expect good things to happen overnight. Likewise, although Issue 40 of Lex Terra has taken quite some time to be published, the newly constituted Editorial Board is proud to introduce certain changes to Lex Terra, starting with this issue. The webzine will now sport a fresh look with a new, sleek, minimalist cover page along with a photograph with an environmental theme, submitted to us by passionate photographers. With this issue, the Centre for Environmental Law, Advocacy, and Research (CELAR) has transitioned to make Lex Terra a Quarterly Webzine as the same shall help in the publication of higher quality submissions. The Centre has also newly activated an Instagram account with the intent to increase its social media outreach. Through these platforms, the Centre shall be able to reach out to more people who are interested in environmental law, and enviro-legal facts and wish to stay updated with the Centre's work. The Centre will soon bring to you a Podcast in the arena of environmental law and also introduce a blog page to publish blogs and articles from various authors and scholars. We look forward to your active participation and wish to have you along with us on our journey to make this one of the best Enviro-legal Centres in the North East of India.

Finally, the publication of this issue would not have been possible without the assistance and encouragement of Lex Terra's pillar of strength and Editor-in-Chief, Dr. Thangzakhup Tombing, Assistant Professor of Law, NLUJAA. We would also like to express our gratitude to Prof. (Dr.) V.K. Ahuja, Vice-Chancellor of NLUJAA, for his keen interest and guidance, which made this issue of the publication possible. We also thank the esteemed Registrar of NLUJAA, Dr. Indranoshee Das, for her continuous support and for being our source of motivation throughout this endeavour. Lastly, the small but dedicated team of peer reviewers and editors deserve a special mention. This issue and all the publications in the past would not have been a reality without your sincere efforts and active engagement.

Lex Terra Editorial Board 2022 - 2023

BLACK GOLD: AN ANALYSIS ON ITS ENVIRONMENTAL IMPACT IN THE NORTH EAST

Meera Bharathi S[*]

Petroleum in its natural form is derived from fossilized biomass over millions of years and thus compatible with the biosphere. However, exploration production and development, refining and blending of petroleum and petroleum products may cause detrimental impact to this planet. Since the late 19th century, with the arrival of global technology, the North Eastern ('NE') region's petroleum fields have become a part of the larger global petroleum economy, which eventually led to commercial exploration of petroleum in the region.[1] Indian historiography has given little attention to the imperial and social histories of petroleum exploration.

I. UNCOVERING BLACK GOLD: HISTORY OF PETROLEUM IN INDIA

Looking back, the possible existence of petroleum in the NE region was first noticed in April 1825.[2] R Wilcox (an Army Lieutenant and Geologist) took notice of the seepage of oil and bubbling gas at a place called *Sup Khong* in the northern part of Assam. In fact, Asia's first and India's oldest Oilfield situated in the *Tinsukia* District, Assam got its name *'Digboi'* when a goaded British Engineer called out to his team *'Dig Boy! Dig!'* as they scavenged for the liquid black gold. The British Raj started to make use of this newly found natural resource to generate the most revenue out of it. But only after Independence did an industrial policy come into place with reference to the management of Oil and Gas (O&G) resources under the Public Sector; however the then government did not formulate a clear-cut plan. The status quo of the regulatory framework on the O&G Sector is discussed in the following chapters.

II. REGULATION OF OIL & GAS SECTOR IN INDIA

II.I *CENTRE-STATE RELATIONS VIS-À-VIS MANAGEMENT OF O&G RESOURCES UNDER THE CONSTITUTION OF INDIA*

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[1] Arupjyoti Saikia, *Imperialism, Geology and Petroleum: History of Oil in Colonial Assam*, 46(12) ECONOMIC AND POLITICAL WEEKLY 48 (2011).

[2] R Wilcox, *Memoir of a Survey of Assam, and the Neighboring Countries Executed in 1825-6-7-8*, 17 ASIATIC RESEARCHES 314-467 (1832).

The Center gains power from Entry 53, List I and Article 246 to make laws i.r.t the regulations and development of oilfields and mineral oil resources, petroleum and petroleum products. As a result, the Central Government ('CG') has exclusive domain over the allocation of resources in the O&G Sector w.r.t exploration, refining, production, etc. On the other hand, the State Government ('SG') has powers over the extraction (other operative measures thereto) of certain O&G resources relating to land (Entry 18, List II), water (Entry 17, List II) and gas/gas work (Entry 17, List II). While the *Sixth Schedule* of the Constitution exempts the four NE states, namely, *Assam*, *Mizoram*, *Tripura* and *Meghalaya* from the purview of the acts made by the Parliament and State Legislature, they fall under the executive wing of the specified states.

Further, due to the overlapping legislative authorities between the Center and the States, the judicial pronouncements have played a key role in defining the constitutional aspects vis-à-vis regulation of O&G resources. In this case, *Special Reference No. I of 2001 v. Under Article 143(1) of Constitution of India*, it was observed: *"…Thus, the legislative history and the definition of 'petroleum,' 'petroleum products' and 'mineral oil resources' contained in various legislations and books and the national interest involved in the – all these factors lead to the inescapable conclusion that 'natural gas' in raw and liquefied form is petroleum product and part of mineral oil resource, which needs to be regulated by the Union."*[3] Even though the legislative power lies in the hands of the CG i.r.t. refining, exploration, production and other operations in the O&G Sector, such powers are not absolute in nature and are subject to 'public interest'. According to the Constitution, irrespective of the governing/supervisory authorities, natural resources are owned by the common citizens and the government (central and/or state) takes the position of a trustee to manage the natural resources, in public interest.[4]

In the recent revolution of energy laws and regulations, the concept of 'Energy Justice' has come to the forefront; under which, the environment is considered as a stakeholder. However, in *Association of Natural Gas v. Union of India*, it was seen that – if the Center is to have all powers w.r.t. O&G Sector, then the states in India are deprived of their equitable shares. For instance, in 2010 Nagaland (that enjoys Special Status under the Constitution) had made a move under Article

[3] *Special Reference No. I of 2001 v. Under Article 143(1) of Constitution of India*, 2004 (3) SCR 534.
[4] Jona Razzaque, *Application of public trust doctrine in Indian environmental cases*, 13(2) JOURNAL OF ENVIRONMENTAL LAW 221–234 (2001).

371A(1)(a) of the Constitution to regulate the O&G Sector in the interest of the development of the backward tribal communities and had constituted the *Natural Petroleum & Natural Gas Rules, 2012*. However, the CG had stated that 371A does not provide legislative power to the Execution wing of the States to regulate and take measures i.r.t. O&G blocks. The Guwahati High Court had clarified the position stating that the 'special status' enjoyed by the states only confers legislative power to 'transfer of land and its resources' and that does not include exclusive regulation of O&G resources and if at all need further deliberation.[5] While the area of legislative power has not been fully settled in the arena to govern the O&G resources, there are other key Acts & Rules that maintain the status quo balance relating to the administration in the O&G Sector.

II.II *Other Legislations relating to the Regulation of the O&G Sector*

In accordance with the *Government of India (Allocation of Business) Rules, 1961* MoPNG is in-charge for the exploration and exploitation of O&G resources; under which the Directorate General ('DG') of Hydrocarbons has been constituted towards the sound management and administration of petroleum-based activities/transactions by keeping in mind the environmental, safety, socio-economic and technological aspects. And, under the *Mines Act, 1952* the DG of Mines Safety regulates the safety, health and welfare of the workers employed in a mine and their working conditions.

The Oilfields (Regulation & Development) Act, 1948 along with the *Petroleum & Natural Gas Rules, 1959* deal with the issuance of PELs, PMLs, collection of royalties, profit and revenue shares for petroleum. *The Manufacture, Storage & Import of Hazardous Chemical Rules, 1989* lays down the method for recycling waste oil and other processing of petroleum-based products. The Petroleum & Natural Gas Regulatory Board (PNGRB) constituted under the *Petroleum & Natural Gas Regulatory Board Act, 2006* also aims to regulate the refining, processing, exploration and production, etc. of petroleum and petroleum products among others. *The Ministry of Petroleum & Natural Gas (MoPNG)* and *the Ministry of Environment, Forest & Climate Change ('MoEFCC')* had also advised that anthropogenic activities that cause air, water and land pollution must be carried at a safe distance from reserved and protected areas.

[5] *Lotha Hoho and Others v. State of Nagaland*, PIL no. 4 (K) of 2015 Kohima Bench of Guwahati.

The Supreme Court had observed that due to the absence of standards and mechanisms relating to the allocation of the natural resources *"the disposal of natural resources should depend on the facts and circumstances of each case…"*[6] Consequently, the CG has framed two important policies, *viz., the New Exploration & Licensing Policy* ('NELP') which was later replaced by *the Hydrocarbon Exploration & Licensing Policy* ('HELP') towards regulating the distribution of O&G resources in a systematic manner. Under the NELP, the operators that enter into 'Product Sharing Contracts' which allows them to recover costs of exploration by not sharing the produced petroleum, the Apex Court ruled out that this Policy is against public interest.[7] This situation had changed with HELP replacing NELP in 2018 where the operators were no longer allowed to recover costs under the aegis of exploration activities furthers the objective behind Article 14 and 39(b) of the Constitution. And, once the O&G blocks are awarded to the contractors, Petroleum Exploration Licenses (PEL) and Petroleum Mining Licenses (PML) are issued under *The Oilfields (Regulation & Development) Act, 1948* and *Petroleum & Natural Gas Rules, 1959.* After which, the exploration and exploitation activities are carried out in accordance with the *Petroleum Act, 1934* and the *Petroleum Rules, 2002* among others. It also lays down safety measures to be undertaken by a supervising authority [PNGRB] to further the protection mechanisms in the O&G Sector.

The Environment Impact Assessment ('EIA') Notification 2020 issued under the *Environment Protection Act, 1986* gives a free pass for the O&G firms that conduct exploration activities by way of extensive drilling and digging of wells (onshore); seismic testing and fracking (offshore); it exempts them from submitting a EIA Plan and public hearing to get environmental clearances under the MoEFCC as they have been moved from category 'A' to 'B2'. While offshore projects still need a Coastal Regulation Zone ('CRZ') clearance, the onshore projects are off the hook. This move during the COVID-19 Pandemic was criticized as a conspiracy devised between the industry and the regulator by environmental activists as it may cause environmental damage to both the marine base and organisms offshore as well as the surrounding ecology and communities living in and around the project sites onshore.[8] The following chapter entails a detailed version of the kinds

[6] *Association of Natural Gas v. Union of India,* (2004) 4 SCC 489.
[7] *Reliance Industries Limited v. Reliance Natural Resources Limited,* (2010) 7 SCC 1.
[8] Nithyanadh Jayaraman, *Public Hearing Exemption for Hydrocarbon Exploration makes a Bad Law Worse,* THE WIRE (May 30, 2022, 10:23 PM), https://thewire.in/environment/eia-public-hearing-exemption-hydrocarbon-exploration-drilling-environment-ministry

of environmental impact caused due to the exploration, production and refining, etc. done by the Petroleum Industries in the North Eastern Region.

III. ENVIRONMENTAL HAZARDS IN THE NORTH EAST VIS-À-VIS PETROLEUM INDUSTRIES

The part that contributes pollution to the environment the most is the refining process as 'n' number of pollutants are released into air, water and land, and next stand the accidents/pollution caused by the Exploration and Production ('E&P') Sector. Emissions from air can come from a range of sources amidst a refinery, such as, work-based accidents, equipment leaks (like wells, valves or other allied devices), process of burning fuels through combustion for the generation of electricity; contaminated steam from processing the distilled liquid wastes, etc. The major problems that may potentially cause pollution and environmental damage are through – normal or fugitive release of gaseous substances emissions, accidental releases, emission of harmful pollutants, and plant upsets.[9]

Further, refineries majorly contribute to the contamination of groundwater and surface water. This is because of the injection of deep wells to explore oil and petroleum resources and when they are at it, they dispose of the wastewater that is generated inside the industrial power plants into the running water below the earth's crust, and such contaminated wastes end up in the aquifers and thus causing groundwater contamination.[10] In general, contamination of soils from the refining processes is considered as a less significant problem when compared to the digging, drilling of wells that cause deforestation and cause environmental disruption to this ecologically-fragile region.

III.I *REAL-LIFE INCIDENTS FROM THE NE REGION*

In 2020, the Well No. 5 of the OIL Corporation in Assam's Tinsukia district that is located dangerously close to the ecologically fragile Dibru-Saikhowa National Park caught fire as it spewed gas and other condensates. It took an eight-membered expert-global team and the whole

[9] Festus M. Adebiy, *Air quality and management in petroleum refining industry: A review,* 4 ENVIRONMENTAL CHEMISTRY AND ECOTOXICOLOGY 89-96 (2022).
[10] *Environmental Impact of the Petroleum Industry,* HAZARDOUS SUBSTANCE RESEARCH CENTERS (2003).

of OIL's Crisis Management team to 'kill' the well in a period of 173 days.[11] Such incidents similar to the Baghjan Fire have happened throughout India to different degrees and affect different kinds of ecological systems. Even though the rules and regulations laid down have been strictly enforced in the majorly-owned oil and petroleum corporations under the public sector, such accidents seem to have no end. Over the past decades, environmental considerations have been integrated into human rights discourse. The age-old weapon of compensation – for the lost lives in times of such accidents or for the pollution caused, leading to ecological damage – doesn't put an end to the matter at hand. In case of ecological damage, even though the sword of 'absolute liability' comes to the rescue, not all cases of fires and work-place accidents reach this stage of attainment in the process of litigation.

IV. WAY FORWARD: TOWARDS A GREENER INDIA

With the rise in energy consumption, the impact of petroleum-based resources on the surrounding environment becomes critical. As India struggles to satisfy its energy needs, steps to explore, produce, refine, etc. the O&G resources will only become more and more ardent in nature. The shift towards green and renewable energy seems to be the last straw that India can hold onto. The Nation has goals to meet, the first target being 500 GW of non-fossil fuel energy by the year 2030 and simultaneously marching towards the 50% energy requirements from renewable sources, as revealed in the 2021 UN Climate Change Conference (commonly known as, *COP26*) held in Glasgow. While the actions taken are massive, the requisite for Clean Energy Technologies, such as renewables, Electric Vehicles in the Transport Sector and energy efficient methods in retrofitting buildings in the Construction Industry also comes to the forefront to make these 'paper' objectives practical. Measures like the *Electricity (promoting renewable energy through Green Energy Open Access) Rules, 2021* initiated by the Ministry of Power to promote the consumption and purchase of green energy (inclusive of the energy from Waste-to-Energy Plants) is seen as a step in the right direction.

[11] D. Raghunandan, *Baghjan Oil Field Fire: A Prelude to Ecological Disaster in North East,* NEWS CLICK (April 3, 2022, 10:09 PM), https://www.newsclick.in/Baghjan-Oil-Field-Fire-Prelude-Ecological-Disaster-North-East (Last visited on April 24, 2022).

IV.I *JUDICIAL WING AIDING THE LEGISLATURE WHILST MAKING POLICIES*

Time and again, the Judicial Review of the O&G Sector regulations has emphasized the refocus towards public interest which well includes the right to a pollution-free environment. And to ensure equitable and just allocation of O&G (especially, petroleum) resources, it is important that the policy directives must be taken to ensure Distributive Energy Justice w.r.t. Article 14, 39(b) and the Public Trust Doctrine. The Top Court had also reiterated that Article 14 of the Constitution must be kept in mind while framing Policies relating to the regulation of O&G Sector[12] because if left unregulated markets can become inimical. Moreover, the Apex Court observed: *'...the constitutional mandate is that the natural resources belong to the people of this country. The nature of the word "vest" must be seen in the context of the Public Trust Doctrine. Even though this doctrine has been applied in cases dealing with environmental jurisprudence, it has its broader application.'*[13] Thus, it is suggested that the policy measures should take into consideration all the stakeholders to promote public interest & the impact it has on the surrounding ecology. Remember! Just as the Court said: Environment is no one's property, but it is everyone's responsibility to protect.

[12] *In Food Corporation of India v. M/s Kamdhenu Cattle Feed Industries,* 1993 1 SCC 71.
[13] *Reliance Industries Limited v. Reliance Natural Resources Limited,* (2010) 7 SCC 1.

A PRACTICAL SHIFT TOWARDS ECOCENTRISM: M.K. RANJITSINH & ORS. v. UNION OF INDIA & ORS.

Udit Raj Sharma[*] *and Anushka Srivastava*[**]

I. INTRODUCTION

The approach of law is taking a shift from Anthropocene to Ecocentric. This shift requires an abstract recognition of eco-centric principles and a change in material and tangible manners of human-nature interactions. This case is a manifestation of the same instance wherein the claim involved a change in power/electricity infrastructure, which was endangering the existence of birds (GIB & Flamingo). The Apex Court of India stood at the crossroads of choice of priority between the two virtues of environment protection – one is clean energy generation through windmills and solar power panels and the other is the protection of the species of birds who are facing the havoc of power lines, which become fatal for them, either through electrocution or through collision.

The case involves the regions of the states of Rajasthan and Gujarat in India. The case involves references to various Indian legislations that function as the guardian of the ecosystem such as the Wildlife Protection Act, 1972, Environment Protection Act, 1986, Compensatory Afforestation Fund Act, 2016, Compensatory Afforestation Fund Management and Planning Authority Rules, Rajasthan (2009), Companies Act, 2013, National Wildlife Action Plan, 2012, Centrally sponsored Integrated Development of Wildlife Habitats Scheme. The Court referred to the landmark judgments of *T.N Godavarman Thirumulpad v. Union of India*[1], *Centre for Environmental Law, WWF- India v. Union of India*[2]& *M.C Mehta v. Kamalnath*[3]. The case involves references to the principles of eco-centrism as distinguished from anthropocentrism, the doctrine of public trust, inter-generational equity, the sustainable development principles, inter alia. The matter involves a synthesis of ***ecology and economy*** wherein the economic and infrastructural arrangements have to be shaped according to the needs of eco-centric principles.

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[1] T.N. Godavarman Thirumulpad v. Union of India, (1997) 2 SCC 267.
[2] Centre For Envir. Law, WWF-I v. U O I & Ors on 15 April 2013.
[3] M.C. Mehta v. Kamal Nath & Ors, (1997) 1 SCC 388.

This case comment broadly touches upon the three aspects. Part I deals with the introductory aspect stating the broad question before the Court. Part II provides for the case analysis of M K Ranjitsinh & Ors. v. UOI (2021) describes essential aspects of the matter involving factual situations, issues before the Court, broad contentions involved, the decision given, the ratio behind the verdict, and critical takeaways from the judgment. Part III makes the concluding remarks commenting upon the significance of the judgment about laying down the pathway for shaping the economy towards ecology and making a ***real*** shift from an anthropocentric to an eco-centric framework of existence.

II. M.K. RANJITSINH & ORS. V UNION OF INDIA & ORS. - CASE ANALYSIS

The three-Judge Bench comprising S. A. Bobde J., CJ., A.S. Bopanna J., and V. Ramasubramanian, J., on April 1, 2021, delivered the verdict in the instant case of The Great Indian Bustard, now dwindling in number was essentially found in the State of Rajasthan, however, due to certain industrial developments, 90% of these birds have disappeared from their natural habitat.[4] The major threat to their life is the installation of overhead power lines. Considering the powerline mortality in Rajasthan, the extinction of the Great Indian Bustard is impending.[5] A report generated by the Ministry of Power on 15.03.2021 suggested that the low voltage line is responsible for endangering GIBs because of electrocution, as a consequence, of small phase-to-phase separation distance, whereas, on the other hand, the high voltage lines are contributing to the unfortunate decline in the number of birds because of collision. In a survey conducted by WWI from 2017-2020, 6 mortalities have been found as consequences of the presence of high tension transmission, and a few of such lines are in connection with Wind turbines and a total of 1 lac birds per year over 4200 Sq. km area.[6] The relief/directions sought by the petitioners broadly involved - (a) Instructing the States of Rajasthan and Gujarat, to come up with predator-proof fencing and protect the birds from any such threats, (b) ensuring supervised and well-calculated grazing in the enclosure, (c) refraining the respondents from installing overhead power lines, (d) preventing the erection of wind turbines and installing solar powered infrastructure, (e) recognizing the potential

[4] Save the Great Indian Bustard (GIB) from Extinction, CONSERVATION INDIA (Sep. 07, 2022, 3:20 PM), https://www.conservationindia.org/campaigns/gib2018.

[5] The Wildlife Institute of India (WII) in its Report "Power Line Mitigation, 2018" has stated that every year 1 lakh birds die due to collisions with power lines. The Report concluded that unless power line mortality is mitigated urgently, extinction of GIBs is certain.

[6] Jhala, Y. V., Dutta, S., Karkarya, T., Awasthi, A. Bipin, Habitat improvement and conservation breeding of the Great Indian bustard: an integrated approach, PROGRESS REPORT III APRIL 2018-MARCH 2020, Wildlife Institute of India.

habitat of the Great India Bustard by the Wildlife Institute of India and preserving their eggs and (f) installing the diverters for the powerlines listed in the application.[7]

The primary issue encircling the case was the protection of the endangered species of the birds in question and finding alternatives to the overhead power lines in the form of underground infrastructure for the same. The primary consideration is the protection of the species in whichever manner possible. In the same light, the feasibility of the usage of bird diverters, and installations of underground power lines network were discussed.

Such public-spirited and ecocentric matters are not adversarial since there is no denial of the need for protection or conservation of the species, which is a matter of community or public interest.[8] The prime contention of the state as respondents rested on financial and technical know-how challenges. It was stated that the installation of high voltage underground lines is not technically feasible as it possesses high cost. Also, in case of any faulty cable, the process of repairing is difficult. Moreover, the cables at the 765 KV level are not easily available, adding that raising the number of joints along with the length of the power cables is not an easy task to be conducted. The petitioners vehemently responded that a similar model of power generation is already under operation in Delhi, hence the installation of the underground power lines is not a new phenomenon, and it is highly feasible. The reports generated by the Power Grid Corporation were brought to the notice of the court and it suggested that the proposal of underground cables of a 220 KV power line holds no novelty and is already in practice in Uttarakhand and Delhi.[9] Emphasis was made on the development that power lines that were 10 km in length were installed under the ground by GETCO, to protect Greater Flamingos, the inhabitants of the Khadir Region of Kutch.

In response to the contentions on the financial challenge, the Court observed and brought it to the notice that an action plan named "Centrally Sponsored Integrated Development of Wildlife Habitats Scheme, 2009", lets the Centre and the State bear the costs of such projects equally. Also, some programs offer 100% central help for the protection of GIB. Putting forward, M.C. Mehta v.

[7] Rakesh Ranjan, Power Generators Must Add Diverters to Save the Great Indian Bustard: Supreme Court, MERCOM INDIA (Sep. 09, 2022, 11:58 PM) https://www.scconline.com/blog/wp-content/uploads/2020/07/20th-Harvard-bluebook.pdf.
[8] Mathew J. Zylstra, Connectedness as a Core Conservation Concern: An Interdisciplinary Review of Theory and a Call for Practice, Springer Science Reviews. 119–143 (2014).
[9] *Id*.at 8.

Kamal Nath (1997), as an example, the Bench asserted that both the State and the Central Government hold the onus to protect the now endangered birds.

III. CONCLUSION AND RECOMMENDATIONS

In line with its constitutional duty as a welfare state (not just for humans) and under *the doctrine of public trust*, the court recognized that the state is the guardian of natural resources, and it possesses the responsibility to nurture such resources, not only for public-benefit but also for the protection of other living organisms in the ecosystem.[10] Such public-spirited and ecocentric matters are not adversarial since there is no denial of the need for protection or conservation of the species, which is a matter of community or public interest. The practice of the shift towards ecocentrism would require a lot more determination and consistent effort than the theoretical shift since it would require frequent introspection and modification of the economic and infrastructural arrangements. This case manifests the economic challenge involved in this shift. An interesting suggestion came up through this case, which is worth considering at sincere levels by the policymakers and the players involved in the electricity/power sector. The suggestion is to grab the attention of every electricity utility that is engaged in power generation, to "Section 135[11] and 166(2)[12] of the Companies Act, 2013", which puts a triple-line bottom approach on certain companies having a specified net worth or turnover or net profit is known as the Corporate Social Responsibility, moreover, it is also expected from directors to act towards the protection of the environment under the act of good faith. Further, the provisions of the "Compensatory Afforestation Fund Act, 2016 (CAF, 2016)" may be used to the advantage of wildlife protection for economic challenges.[13] Overall, this case has a lot to offer for all organs, instrumentalities of the state, and the citizenry in facilitating their shift towards an eco-centric reality.

[10] *Supra* note 1, at 4.

[11] Companies Act, 2013, S. 135, No. 18, Acts of Parliament, 2013 (India).

[12] It provides for the Director of a Company to act in good faith, not only in the best interest of the Company, its employees, the shareholders, and the community but also for the protection of the environment

[13] Section 4, 5 & 6 of the Act of 2016, provide for the utilization of the fund for measures to mitigate threats to wildlife. The State of Rajasthan has already set up a Compensatory Afforestation Fund Management and Planning Authority (CAMPA) on 12.11.2009. Rule 5(2)(i) of these Rules permits the use of the State Fund for the improvement of wildlife habitats.

ECOCIDE AS A PROSPECTIVE INTERNATIONAL CRIME UNDER THE ROME STATUTE

Arya Mishra[*] & Prachita Agrawal[**]

INTRODUCTION

"A healthy environment is not only key to the achievement of human rights such as the most fundamental of all, the right to life, but also increasingly recognized as a human right in itself."

-Prisca Merz

Environmental degradation started when human beings learned to exploit the environment to their satisfaction and needs. The narrative of humanity has been marked by development, but these accomplishments have been achieved by persistently changing the natural environment into one which is more suitable and adaptable to the satisfaction of their needs. This persistent change has caused irrevocable damage to the environment, and this is not only a byproduct of human adaptability but also of war and the industrial revolution.

The Rome Statute established the International Criminal Court (ICC), in the aftermath of World War II, as a permanent judicial body to adjudicate and prosecute people accused of, war crimes, genocide, crimes of aggression and crimes against humanity.[1] It is believed that the massive destruction of nature, committed during war times, has underlined the problem of ecocide on an international level. The governing body of the International Criminal Court in its annual meeting in December 2021 defined ecocide as *"unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts*"[2]. Recently, the Russian aggression against Ukraine, which led to the widespread devastation of biodiversity, natural ecosystems, and climate, has highlighted how ecocide is rising but at the same time, it remains unrecorded and undiagnosed. This reflects how even after decades of discussions around the problem, the current international framework does not acknowledge or punish deliberate acts leading to the devastation of the environment. In the light of the discourse surrounding environmental

[*] 2nd Year Law Student at Maharashtra National Law University, Nagpur.
[**] 2nd Year Law Student at Maharashtra National Law University, Nagpur.
[1] About the Court, The International Criminal Court, https://www.icc-cpi.int/about/Pages/default.aspx (last visited Jan. 26, 2022)
[2] James Dawes, *It Is Time to Make Ecocide an International Crime,* OPEN GLOBAL RIGHTS (last visited Aug. 26, 2022), https://www.openglobalrights.org/it-is-time-to-make-ecocide-an-international-crime//.

damage, this article advocates Ecocide to be the fifth International Crime under the Rome Statute.

I. HISTORY OF ECOCIDE

The origin of the term 'ecocide' is traceable to its use by Prof Arthur W Galston in 1970 when he proposed 'a new international agreement to ban ecocide' at the Conference on War and National Responsibility. Thereafter, in 1972, Swedish Prime Minister Olof Palme, accused the US of creating an ecocide in Vietnam by using the toxic defoliant 'Agent Orange' during the Vietnam War.[3] In 1991, the Draft Code of Crime Against the Peace and Security of Mankind was formed by the International Law Commission. Article 26 of this Code stated, "an individual who willfully causes orders the causing of widespread, long term and severe damage to natural environment shall, on conviction thereof, be sentenced"[4]. However, the International Law Commission decided to terminate Article 26 from the Draft Code and the code was reduced to four crimes which are presently found in the Rome Statute *viz.* war crimes, crime against humanity, genocide, and crimes of aggression.

In 2010, British barrister Polly Higgins requested the UN Law Commission to amend the Rome Statute to include ecocide as the fifth crime against peace and proposed a draft to amend the to include ecocide as a crime under the Rome Statute[5].The proposed draft focused on the protection of anyone who is capable of 'being'. According to the draft, majorly everything that signifies life, which constitutes (i) humans, (ii) animals, fish, birds, insects; (iii) plant species; (iv) other living organisms, must be protected.[6]

II. ECOCIDE AND ITS IMPACT ON THE ECOLOGY

Ecocide started with human greed for resources. The primitive man was capable of heedlessly misusing the resources as well. That continues even today in various forms like fossil fuel

[3] Anastacia Greene, *'The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?'* (2019) 30 FORDHAM ENVIRONMENTAL LAW REVIEW (2019) <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1814&context=elr> (last visited Jan. 26, 2022).

[4] Id. 15.

[5] Null Prisca Merz, '*Ecocide: Prisca Merz Argues It Is Now Time to Act against the Large-Scale Damage or Destruction of Ecosystems*', Socialist Lawyer (2014) <https://www.scienceopen.com/hosted-document?doi=10.13169/socialistlawyer.68.0016> (last visited Aug. 26, 2022).

[6] Amisha Tripathi, 'Feasibility of Making Ecocide a Fifth Crime Against Peace under the Rome Statute, JELPD VIII (2021) <https://vidhilegalpolicy.in/wp-content/uploads/2022/04/JELPD-Journal-2021_-1.pdf> (last visited Sept 22, 2022).

extraction, slash and burn agriculture, destruction of wildlife, etc. The present situation of global warming and climate change can be very well attributed to human activities.

Fire was one of the main causes that led to ecocide since the early ages. When the ancient hunters wanted more areas for hunting, they cleared up vast forest lands, similar to what farmers in contemporary times do in slash and burn agriculture. Additionally, failure to maintain irrigation and soil fertility has caused much trouble to the ecosystem. But ecocide still did not impede the expansion of the human species. Humanity has altered the natural environment with its evolution to satisfy the needs of its kind. This demands serious intervention before we starve ourselves of earth's resources.

The Amazon rainforest, home to about 3 million species of flora and fauna, was set ablaze by forest fires.[7] The Amazon, which absorbs the harmful CO_2 that goes into the atmosphere, is where forest land more than 8 times the size of London has already been destroyed.[8] The Chernobyl Nuclear Plant explosion had contaminated the aquatic, atmospheric, terrestrial and urban environments with radionuclides.[9] The escape of Methyl Isocyanate in the infamous Bhopal Gas Tragedy, had contaminated local rivers, made the crops unsafe for humans and over 2000 animals died that night.[10] Accidental mine water discharges significantly contribute to surface environment degradation. The Talvivaara mine disaster in Finland led to the accumulation of thousands of kilograms of uranium which are a massive risk to health and the environment.[11] Industrial needs for mining and extraction have led to the situation at Alberta Tar Sands in Canada. The extraction of Bitumen oil in this area takes a toll on water and energy resources alike and 2 million acres of boreal forests have already been degraded due to wildfires

[7] Letters, '*Amazon Fires: Why Ecocide Must Be Recognised as an International Crime*' The Guardian <https://www.theguardian.com/environment/2019/aug/23/amazon-fires-why-ecocide-must-be-recognised-as-an-international> (last visited Aug. 25, 2022).

[8] *'Amazon Fires: Are They Worse This Year than Before?'* BBC News (28 August 2020) <https://www.bbc.com/news/world-latin-america-53893161> (last visited Aug. 25, 2022).

[9] 'Environmental Consequences Of The Chernobyl Accident And their Remediation: Twenty Years Of Experience: Report of the Chernobyl Forum Expert Group 'Environment' <chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/https://wwwpub.iaea.org/mtcd/publications/pdf/pub1239_web.pdf> (last visited Sept. 25, 2022).

[10] 'The Bhopal Gas Tragedy: Facts & Effects - Video & Lesson Transcript' (*Study.com*) <https://study.com/academy/lesson/the-bhopal-gas-tragedy-facts-effects.html> (last visited Aug. 25, 2022).

[11] 'Finland: Talvivaara Environmental Disaster Goes on and On' (*London Mining Network*, 30 November 2012) <https://londonminingnetwork.org/2012/11/finland-talvivaara-environmental-disaster-goes-on-an-on/> (last visited Aug. 25, 2022).

and industrial development.[12] This is why vigilance and strict action measures are paramount now, or it will become a point of no return.

III. ECOCIDE AS THE FIFTH INTERNATIONAL CRIME

From the indigenous tribe who lose their land due to deforestation to the urban population whose health gets affected due to pollution and the condition of their settlements is compromised because of fracking exploration, ecocide affects all beings. The law on ecocide must not only be such which can come to aid after the effects have already ensued, rather it must be preventive, pre-emptive as well as post-operative. It needs to be preventive because that would help in avoiding hazardous industrial activity, pollution, and degradation of the environment. Pre-emptive, because nationally and internationally it creates a duty of care, ensuring that the consequence of actions is considered beforehand, and a different way of working is identified. When corporate entities or individuals start getting prosecuted for their actions and be made to pay fines or get imprisoned, a positive stride towards justice can be ensured. Therefore, the law of ecocide can be considered postoperative too. Amending the Rome Statute will help to make states, corporate entities, or individuals accountable for their act of degrading the environment which they do in the rapaciousness of profit maximization.

Albeit the draft code morphed into the lesser Rome Statute, some states included ecocide into their own national penal codes. Experiencing the horrors of the Vietnam War, Vietnam became the first country to include the crime of ecocide in its domestic law followed by Russia after the disintegration of the USSR in 1991.[13] A total of 10 countries have enacted laws against ecocide as a crime during peacetime.[14]

Even though these countries have already made Ecocide a part of their domestic law, they have failed to address the question of 'intent'. The mass destruction of the environment due to war or state and corporate actions is mostly unintentional but rather accidental. Making ecocide an International Crime, where intent will be a mandatory criterion to prosecute, can open up a legal loophole of delegating responsibility on the basis that the damage caused was not

[12] '*Everything You Need to Know about the Tar Sands and How They Impact You*, Greenpeace Canada' <https://www.greenpeace.org/canada/en/story/3138/everything-you-need-to-know-about-the-tar-sands-and-how-they-impact-you/> (last visited Jan. 30, 2022).

[13] Null Prisca Merz, 'Ecocide: Prisca Merz Argues It Is Now Time to Act against the Large-Scale Damage or Destruction of Ecosystems' [2014] Socialist Lawyer <https://www.scienceopen.com/hosted-document?doi=10.13169/socialistlawyer.68.0016> (last visited Jan. 30, 2022).

[14] 'Ecocide law in National Jurisdictions' <https://ecocidelaw.com/existing-ecocide-laws/> (last visited Sept. 22, 2022).

intended. Therefore, it is pertinent that the law of ecocide should consider human caused environmental deterioration as a crime of ***'strict liability'***. This will create a pre-emptive duty on corporate activities to prohibit mass destruction of the ecosystem as they will no longer have the defense that ***they didn't intend to cause ecocide***.

The Stop Ecocide Foundation has collaborated with the Independent Expert Panel of legal practitioners and professionals to propose a draft that could function as a bedrock for making ecocide an international crime. Article 8 of the draft proposes a definition of ecocide which was reiterated by the governing body of the International Criminal Court in its recent annual meet held in December 2021.[15] To enact this proposition of the draft, a signatory country must call for an amendment to the Rome Statute. The draft of the proposed amendment then has to be submitted to the Secretary-General of the United Nations who circulates it to all the State Parties. The State Parties then, at that point, vote regardless of whether to take up the proposal. If the proposal is taken up, the alteration can allude to a review conference, or to vote by the Assembly of State Parties. The proposition is adopted if a two-thirds majority of State Parties vote in favor.[16]

However, one major shortcoming of making ecocide a crime is establishing liability. Many scientists claim that ecocide is a crime without a criminal. Ecological obliteration, at times, is the after effect of a dramatic event which could be an oil spill or nuclear explosion, but often it happens as a consequence of many undramatic, small actions, by a lot of individuals over the course of years. Well, global warming and climate change occur as a consequence of the construction and operations of the capitalist system. States and corporate entities efficiently plan and head this capitalist system therefore, they are the ones who should also be made responsible. Making ecocide an international crime is of paramount importance as it will help us not only in altering the climate change narrative but also address the question of establishing liability by holding States and corporations responsible for their heinous acts of obliterating the environment.

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[15] 'Stop Ecocide Foundation, Independent Expert Panel for the Legal Definition of Ecocide' <chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf> (last visited Sept. 25, 2022).

[16] 'Rome Statute of the International Criminal Court' <https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx> (last visited Jan. 26, 2022).

IV. EXPECTED OUTCOMES OF AMENDING THE ROME STATUTE

Many UN SDGs are related to safeguarding the environment and natural resources. According to the SDG report 2020, countries of the world are not taking appropriate measures to achieve global goals by 2030.[17] Although the Covid pandemic had affected production and hampered economic activity, the natural environment continued to deteriorate.[18]

Additionally, the Paris Agreement, which is already a legally binding international treaty on climate change, was adopted with the view to limit global warming well below 2 and preferably to 1.5 degrees Celsius.[19] The Nationally Determined Contributions under Article 4 of the agreement require each member to prepare and maintain climate goals that it aims to achieve.[20] However, these nationally determined contributions, by definition, focus on risks in national territories and significant blind spots concerning Climate Related Security Risks still remain.[21]

Moreover, the Global Risks Report 2022 which is released annually by World Economic Forum, has highlighted "extreme weather" and "climate action failure" as top risks in the short, medium and long-term outlooks.[22]

With the inclusion of Ecocide as the fifth international crime, there can be a decline in business projects that severely affect the environment making it a positive stride towards achieving goals. Unlike the existing four international crimes, ecocide would be the only crime in which human harm is not a prerequisite for criminal action.[23] This can serve as an effective tool for the transition from an anthropocentric to an ecocentric approach while making laws.

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[17] 'Sustainable Development Goals Report 2020— SDG Indicators' <https://unstats.un.org/sdgs/report/2020/> (last visited Jan. 26, 2022).
[18] Ibid.
[19] 'The Paris Agreement | UNFCCC' <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (last visited Jan. 26, 2022).
[20] 'Nationally Determined Contributions (NDCs) | UNFCCC' <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs/nationally-determined-contributions-ndcs#eq-4> (last visited Jan. 26, 2022).
[21] 'Climate-Related Security Risks In The 2020 Updated Nationally Determined Contributions on JSTOR' <https://www.jstor.org/stable/resrep28408> (last visited Jan. 26, 2022).
[22] 'Global Risks Report 2022' (*Drishti IAS*) <https://www.drishtiias.com/daily-updates/daily-news-analysis/global-risks-report-2022> (last visited Jan. 26, 2022).
[23] Josie Fischels, 'How 165 Words Could Make Mass Environmental Destruction An International Crime' *NPR* (27 June 2021) <https://www.npr.org/2021/06/27/1010402568/ecocide-environment-destruction-international-crime-criminal-court> (last visited Jan. 26, 2022).

CONCLUSION

If ecocide does become the fifth international crime, it will not only prevent countries from exploiting the limited resources that are available on this planet but also inspire other non-member countries to frame laws recognising penal action against harm done to the environment. However, this needs immense support from all around the world because the International Criminal Court has restrictions on what it can do alone.

As already discussed, with one law, the very motive to promote business sustainability for the environment can prosper. There can be a change in the current profit maximization objective because there will be a legislation under which they can be held liable individually and as a corporation. However, making it a law and implementing the law needs a paradigm shift from perceiving Earth only as property or a set of resources that can be exploited to acknowledging this valuable gift, be grateful and protect this ecosystem that we have inherited from our ancestors, and will pass on to the generations to come.

A COMPREHENSIVE PERUSAL OF THE INTRINSIC ADVERSITIES CONCERNING ENVIRONMENT IN THE MODERN SCENARIO: AN INDIAN OUTLOOK

Bhaskar Singh[*]

I. INTRODUCTION

Primordially sensitization concerning the grave environmental issues amongst common public is upheld by the Government in such a manner that it has an ephemeral effervescence upon their subconscious mind in regard of safeguarding the essential resources of the environment and it would not be erroneous to say that the idiosyncrasy possessed by people today in regard of environment certainly acts antithesis in relation to the policies incessantly put into force for reinforcing the concept of sustainable development[1]. Many environmental concerns are reported further to the authorities of National Green Tribunal in a huge manner but a humongous of matters in regard of environment are still in pendency and majority of them have not been yet taken into a solemn consideration which is incessantly undermining the environmental capacity[2]. Multifarious ideologies concerning the protection of the environment in context of shifting a primary focus on the future needs seems to be emerging at a high speed but there is no awareness about the depletion of human resources that is happening because of environmental degradation. It is a state of severe dilemma and chagrin that the affluent biodiversity of our country which is known for its vitality and prominence in possessing variety of life forms is affected disastrously because of the overexploitation of resources by humans and excessive development of technological influence[3]. There are many lacunas in channelizing the policies concerning the well-being of the environment and this intrinsically sub serves a confounded ideology of environmental structural pattern in the modern scenario. Global warming, Deforestation, Altering precipitation patterns, landslides, floods, earthquakes, etc. are all the repercussions of human activities that are extravagantly performed and have paved an explicit way of a hollow structural pattern of

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[1] Zahid Bashir, *A Study of Environmental Awareness, Attitude and Participation Among Secondary School Students of District Kulgam , J & K ., India*, 11 INT. J. MULTIDISCIP. EDUC. RES. 80 (2022).

[2] Gitanjali Nain Gill, *Mapping the power struggles of the national green tribunal of India: The rise and fall?*, 7 ASIAN J. LAW SOC. 85 (2020).

[3] Allister Slingenberg et al., *Study on understanding the causes of biodiversity loss and the policy assessment framework*, FRAMEWORK 1 (2009).

environment[4]. Several other crucial factors also play a pivotal role in determining the environmental degradation and if the excessive influence of these detrimental factors is not brought to a cessation, then the country might suffer severe environmental concerns and profoundly it will also impact the future needs of the human society. Humans and environment are interlinked to each other robustly in such a manner that if even one is not placed in a systematic order, then directly it would hamper the development of environment to a huge extent and this certainly ensures the mismanagement of resources utilized by humans[5]. The productivity and efficiency of resources which determines the quality of life for an individual being must be safeguarded by maintaining an environmental balance and this can only be achieved through the collective endeavor and promoting awareness and knowledge in regard of the beneficial aspects and dimensions of environmental science[6]. A systematic approach in the direction of aggrandizing the concept of Sustainable development insightful training sessions and workshops must be conducted regularly in schools and colleges for highlighting the significance of a healthy environment in the modern scenario. Furthermore, the paper is dedicated to the study of variegated factors which contributes to a certain fall down of the quality of environment and individual roles played in order to deal with environmental challenges in a comprehensive manner.

II. A PROFOUND SCRUTINY OF THE MUTILATION OF ENVIRONMENTAL STRUCTURE

Industrialization and excessive vicissitude pertaining to the natural commodities have extravagantly affected the affluent pulchritude of environment in such a manner that it has resulted to many disturbances in the water cycle, management of forests, conservation of soil, utilization of resources widely[7]. Air and water pollution are the closest symbolic representations of the environmental degradation that can be understood in terms of the ineffectiveness of environmental courts in resolving the conflicts which are in contradiction with environment and burgeoning

[4] F. A. Sale & F. S. Agbidye, *Impact of human activities on the forest and their effects on climate change*, 5 AUST. J. BASIC APPL. SCI. 863 (2011).
[5] Eleonora Nillesen & Erwin Bulte, *Natural resources and violent conflict*, 6 ANNU. REV. RESOUR. ECON. 69 (2014).
[6] Yannis Hadzigeorgiou & Michael Skoumios, *The development of environmental awareness through school science: Problems and possibilities*, 8 INT. J. ENVIRON. SCI. EDUC. 405 (2013).
[7] Rasmi Patnaik, *Impact of Industrialization on Environment and Sustainable Solutions - Reflections from a South Indian Region*, 120 IOP CONF. SER. EARTH ENVIRON. SCI. 0 (2018).

human avarice[8]. Diversified life forms existing inside the water are hugely affected due to the wastes thrown into rivers, lakes, ponds, etc. and the water becomes toxic which results in the death of many aquatic species. Much emphasis has been stressed upon the sustainable development of biodiversity in majority of policies which are concerned with the idea of linking the human needs to the environmental capacity nevertheless this interdisciplinary relation of interdependence is obfuscating[9]. Sustainable approach for interlinking the energy building capacity and human resource management to balance environmental stability is an initiative by the Government and many Indian environmental welfare organizations which are consistently working to reduce the harmful effects of pollution and other obnoxious sources to nature. The need for environmental courts has been advocated by many connoisseurs in the arenas of zoology, botany, etc. to reduce the despondency in regard of flourishing technocratic advancements[10]. A primary emphasis has been also laid upon the systematic management of energy building capacity for promoting the ideal framework of a well-equipped network of ecological structure. In the case of *A.P. Pollution Control Board v. Prof. M.V. Nayudu*[11], Supreme Court considered precautionary approach and burden of proof as a base and stated that scientific validations and references are necessary to determine the veracity of a complicated issue pertaining to environmental harm. It is very much required for the present generation to act in an appropriate way analogous to the environmental dealings and must be holding a stupendous knowledge about the recent laws, transformations, amendments, and initiatives that are being put forward in order to maintain environmental stability[12]. Excerpt taken from the collection of R. Buckminster Fuller- *"Pollution is nothing but the resources we are not harvesting. We allow them to disperse because we've been ignorant of their value."* By referring to the above statements we can easily infer that the euphoria has certainly waned in regard of making Earth a better place of living and to ensure that the principles, aims and

[8] Swati Tyagi, Neelam Garg & Rajan Paudel, *Environmental Degradation: Causes and Consequences*, 81 EUR. RES. 1491 (2014).

[9] S E E Profile, *The link between human wellbeing and sustainable development*, 2 EXCELL. INT. J. EDUC. RES. (MULTI-SUBJ. JOURNAL) 0 (2021).

[10] Madhav Gadgil & Chinmaya S. Rathore, *Current status and management of scientific information relating to Indian environment*, 81 PROC. INDIAN NATL. SCI. ACAD. 1087 (2015).

[11] *A.P. Pollution Control Board v. Prof. M.V. Nayudu, 1999(2) SCC 718, 27th January, 1999*

[12] Shibani Ghosh, Sharachchandra Lele & Nakul Heble, *Appellate Authorities Under Pollution Control Laws in India: Powers, Problems and Potential*, 14 LAW, ENVIRON. DEV. J. 45 (2018), www.lead-journal.org.

scope of sustainable development and Agenda 21 acts in the furtherance of environmental well-being a proper approach is needed with a right means and objective[13].

III. ENVIRONMENTAL IMBALANCE AND DISTORTION OF ECOLOGICAL STRUCTURE: A GREAT MENACE TO THE HUMAN SOCIETY

Environmental perturb arising in a wanton manner has contrived the Intergovernmental Panel on Climate Change (IPCC) to cogitate over the rampant wane in significant constituents that plays a prominent role in determining the peculiarity of rainfall patterns and a meticulous governance of altering climate mechanisms. The members of the panel put forwarded variegated ideologies pertaining to the issue and ventured an unwavering effort for establishing the paradigm on which sundry radix of law vindicates the fidelity for succinctly analyzing the major lacunas in channelizing the policies with discretion ability[14]. The world is facing a shortage of natural elements that surround the Earth which determines the vitality and viability of the atmosphere, and upholds the integrity of the ecosystem by catering to the needs of living entities. Underlying the principles of Agenda 21 a comprehensive approach has been took up by the United Nations Conference on Human Environment to combat the environmental degradation and promote the concept of sustainable development in order to maintain a balance in the overall functioning of ecosystem[15]. The support system which assists in the amelioration of a vibrant biodiversity in terms of variety of life forms has also been taken into a solemn consideration under the programmes being regulated by variegated governmental bodies and organizations to intensify the roots of environmental capacity to a huge extent[16]. An incessant rise in the ocean acidification, ice-sheet melting and sea level rise hampers the propitious living conditions for human beings as well as animals and certainly this amount to a disastrous effect upon the ecological structure and the vigorous effervescence of nature also begins to limit because of the decline in affluent biodiversity[17]. The key concepts laid out by Kyoto Protocol concerning the environmental

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[13] Shubhashri Upasani, *REJUVENATE HEAVY TRAFFIC ZONES -ENHANCE HUMAN BREATH! (A PROPOSAL TO DEAL WITH THE AIR POLLUTION ISSUE THROUGH THE DESIGN Stochastic Modeling & Applications*, 25 STOCH. MODEL. APPL. 1890 (2022).

[14] Alistair Woodward et al., *Climate change and health: On the latest IPCC report*, 383 LANCET 1185 (2014).

[15] William Lafferty & Katarina Eckerberg, *The Nature and Purpose of Local Agenda 21*, THE LANCET 1 (2000).

[16] Kent H. Redford et al., *Mainstreaming biodiversity: Conservation for the twenty-first century*, 3 FRONT. ECOL. EVOL. 1 (2015).

[17] Sam Dupont & Hans O. Pörtner, *A snapshot of ocean acidification research*, 160 MAR. BIOL. 1765 (2013).

degradation revolves around the basic emphasis pertaining to curbing the effect of Greenhouse gases, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride which are consistently undermining the quality and influence of environment[18]. A keen sense of responsibility is lacking amongst the individuals in the context of environmental protection. And acting analogous to the provisions of law laid out by an intellectual team of panelists who work for the welfare of environment to support government in their initiative of promoting the concept of Green Revolution is a constitutional duty of every individual[19]. Alteration of the preliminary approach towards sustainable development marks the beginning of many intricacies and adversities in restoring the environmental health and productivity in a well-disposed manner. The Earth is at large risk due to the dwindling of environmental stability and if the threat to nature cannot be brought to cessation human has to suffer a big loss in the times ahead[20]. Anthropologically many Vedic scriptures and transcendental Hindu literatures are summarily dedicated to the study of the importance of nature and its essential role in reinforcing the ideology of a balanced ecological structure and crucial aspects that are being recognized in maintaining the integrity of environment[21].

IV. CONCLUSION

The divine bond of humans and environment is eternal and both are intrinsically interconnected in a well-organized manner which influences the biodiversity to flourish and develop at a large scale. Presently the environmental challenges that are being faced by human society hamper this interconnectivity to a certain extent and also miscellaneous faces of nature in our daily lives depict a painful story of its exploitation. Negligence of humans over the years has resulted in the degradation of the environment at a wide scale and holding each other responsible for the destruction caused to nature is simply an act of foolishness because equitably everyone has played a keen role in the disfigurement of environmental balance. In the age of globalization and industrial progression it is very much solicitous for us to place a keen emphasis on safeguarding the natural

[18] Yoomi Kim, Katsuya Tanaka & Shunji Matsuoka, *Environmental and economic effectiveness of the Kyoto Protocol*, 15 PLOS ONE 1 (2020), http://dx.doi.org/10.1371/journal.pone.0236299.
[19] S Yadav & S Anand, *Green Revolution and Food Security in India: A Review*, 65 NATL. GEOGR. J. INDIA 312 (2022), https://www.ngji.in/index.php/ngji/article/download/38/35.
[20] Matthew N. O. Sadiku et al., *Environmental Studies: An Introduction*, 1 INT. J. SCI. ADV. 153 (2020).
[21] R. Renugadevi, *Environmental ethics in the Hindu Vedas and Puranas in India*, 4 AFRICAN J. HIST. CULT. 1 (2012).

resources and environmental awareness programmes in order to systemize the concept of sustainable development and efficiently cater to the needs of future generations. The environmental courts have opined in majority of its verdict being advanced in terms of laying out a decision for environmental degradation that the interpersonal relation of humans and environment is of a kind that is based on a sensitive foundation and if humans cannot sense this relativity, then it is a pure one-sided affection. Ganga river pollution is the live example of human's ferocious acts and their corrupt idiosyncrasy which they hold towards nature. Disposal wastes, industrial toxic substances, municipal garbage being discharged into the river in a high amount also assists in the malfunctioning of the environmental structure. Many projects by the Indian government were also taken up to clean Ganga and protests were also held such as Save Ganga Movement, Narmada Bachao Andolan, etc., in order to strike out an environmental balance but the aims and scope of these projects could not be fulfilled and lead to the failure of implementing social welfare environmental policies primarily at a large scale. From a legal perspective protecting the environment and safeguarding forests, wildlife and other natural resources of the country are significant for an individual under the Article 48 A of the Constitution of India but the provisions, statutes, articles enshrined in law concerning the welfare of environment are absolutely not taken into regard by the human society which is generally distorting the link between law and society and sub serves a hollow ecological structure. Energy building capacity is not being channelized in a proper direction which certainly affects the basic need of the future generations and a sustainable approach in the direction of environmental conservation cannot be also upheld because of the over exploitation of resources at a wide scale. Environment is also a living force which is the manifestation of divine abode and reflects the inner consciousness of an individual.

ENVIRONMENTAL & CLIMATE CHANGE DISPUTES THROUGH THE LENS OF ARBITRATION

Akash Nath[*] *and Ankush Nath*[**]

I. INTRODUCTION

Notwithstanding the cooling influence of La Niña, a climate pattern resulting from oceanic weather variations, the year 2022 has been gauged to continue - for the eighth time in succession - as one of the hottest recorded years on Earth.[1] Therefore, it is widely understood that sustained discourse on climate change is not essentially unanticipated. All probable arguments against the potentiality of climate change in giving rise to unprecedented risks stand refuted through multiple studies and reports.[2] This has consequently led to increasing pressure on public and private sectors to espouse mechanisms which inhibit aggravated climate change. Incremental shifts in existing policies and structures are extensions of such efforts.

Not surprisingly therefore, there have been an increasing number of disputes arising from climate change / environmental issues. Such disputes and consequently arising legal issues have predominantly been managed in pursuance of litigation, leaving arbitration as a less endeavoured remedy. However, the role of arbitration is of utmost importance, owing to the inevitability of disputes increasing.

In the second part of the paper, the scope of climate change disputes will be discussed. The third part entails a discussion on some important international frameworks related to arbitration. The fourth part enlists certain benefits of arbitrating climate change disputes. Subsequently, the fourth part discusses investment arbitration as an effective means to increase climate change accountability, further analysing the utility of adopting the procedure. In the fifth and the final part,

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[1]*See* Press Release, MET OFFICE, December 21, 2021, available at https://www.metoffice.gov.uk/about-us/press-office/news/weather-and-climate/2021/2022-global-temperature-forecast (Last visited on January 9, 2022) (for comparison with temperatures from previous years).

[2] *See generally* World Economic Forum, *Glaciers, sea levels and climate change: What mass-melting means*, May 5, 2021, available at https://www.weforum.org/agenda/2021/05/climate-change-shrinking-glaciers-highlight-need-for-more-government-interventions/ (Last visited on January 11, 2022); NOAA Climate Gov, *Climate Change: Mountain glaciers*, February 14, 2020, available at https://www.climate.gov/news-features/understanding-climate/climate-change-glacier-mass-balance (Last visited on January 9, 2022) (proving the effects of global temperatures on glaciers); World Health Organization, *Climate change and health*, October 30, 2021, available at https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health (Last visited on January 9, 2022) (highlighting impacts on health).

the need for an International Court for the Environment will be questioned. Conclusively, the paper sets the tone for the need for the increased contribution of arbitration in tackling climate change disputes.

II. CLIMATE CHANGE DISPUTES

Three distinct classifications of climate change related disputes have been made in the ICC (International Chamber of Commerce) Report which are briefly explained below:

Contracts of specific transition, adaptation or mitigation - The first category allows for disputes directly arising from contracts which are entered into in order to reach the specific goals and commitments of climate change agreements such as those relating to the "United Nations Framework Convention on Climate Change" (UNFCCC) or from those concerned with more general investment in energy or related system transition.

An example would be *"[a] contractor in a project to supply and erect a wind farm seeks (i) the suspension of the drawing of first demand performance bonds, (ii) deemed final acceptance, and (iii) payment of the balance of the price. The owner alleges that the output does not meet technical economic indicators for definitive acceptance as approved by public authorities financing, based on energy output, efficiency and/or emission targets."*[3]

Contracts of more general nature - The report acknowledges the existence of general contracts in sectors like energy, transport, infrastructure, agriculture which have no climate change specific purposes but may still be impacted by contracting parties' responses to inter alia, regulations, laws and impacts of climate change.

An example of this would be where *"[a] contractor in charge of construction of a new deep-water harbour disagrees with the owner of the harbour over whether increased salinity of fresh water sources was induced by rising sea-levels, owing to climate change, albeit that other contributing factors may exist. The parties also differ as to the allocation of such risks. Contractor seeks (i) an extension of time to complete the construction and resulting costs, and (ii) additional costs*

[3] INTERNATIONAL CHAMBER OF COMMERCE, *Report on Resolving Climate Change Related Disputes through Arbitration and ADR*, (2019), available at www.iccwbo.org/climate-change-disputes-report (Last visited on January 10, 2022).

incurred in the importation of sand from a more remote location to counter the impact of increased salinity"[4]

Submission Agreements - As rare as they may be, submission arguments wherein parties agree to form an arbitration agreement only after a dispute has arisen. These are also of importance when existing courts or dispute resolution mechanisms are inadequate or complexify jurisdiction.
An example for this would be *"[a] local indigenous population of subsistence farmers, fishermen and associated small businesses located in and around a new REDD+ certified forest carbon project area and bordering coastal region sue the foreign investors in the project and the host State in the local courts, alleging breach of constitutional, indigenous and other human rights and in tort against the foreign investor. The parties may consent to resolve those disputes in a single, specialist forum pursuant to a submission agreement."*[5]

III. ANALYSIS OF PRESENT FRAMEWORK

Although not utilised to its maximum potential, international agreements have dispute settlement mechanisms. Article 11 of the "Vienna Convention for the Protection of the Ozone Layer"[6] (VCPOL) lays down the mechanism under the Montreal Protocol, which allows for the Secretariat or any party suspecting another of non-compliance to bring forward complaints before an Implementation Committee, which is, in turn responsible for making recommendations to the "Committee Of Parties" (COP) to undertake necessary actions and steps to ensure compliance.[7] Further, the UNFCCC allows for dispute settlement through negotiation, conciliation in the International Court of Justice (ICJ), and "[a]rbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration"[8] or as per the VCPOL provision.

The arbitration annex as envisaged in the UNFCCC has not been adopted till date. While there were hopes of discussion and adoption during COP 26 which took place in November 2021, the

[4] *Id.*
[5] *Id.* at 3.
[6] Vienna Convention for the Protection of the Ozone Layer, March 22, 1985, 1513 UNTS 293.
[7] Montreal Protocol, September 15, 1987, 6 I.L.M. 1541, 1550.
[8] United Nations Framework Convention on Climate Change, May 9, 1992, A/RES/48/189.

arbitration annex was neglected, thereby continuing with no system of compliance for the UNFCCC. The absence of the arbitration annex not only means a deprivation of coercive compliance but also signifies that the Agreement lacks an important dispute resolution mechanism. This translates to mean that the Paris Agreement[9], while universally respected, has no effective mechanism to enforce obligations on states.

A report by the International Bar Association has further highlighted the use of arbitration to resolve disputes between states and investors on climate and environment related matters. In this regard, the Permanent Court of Arbitration (hereafter referred to as PCA) has been suggested as one of the preferred forums. PCA has been advocated to remedy the shortcomings in climate change related dispute resolutions.[10] Based on the 1976 UNCITRAL Arbitration Rules, the "PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment" are of distinct relevance as it is the only modern set of arbitral rules concerning environmental disputes drafted by an international dispute resolution body.[11] The author of this paper believes that a few changes to the PCA will allow it to be more qualified to deal with climate change disputes. The task force also recommended arbitration institutions such as the LCIA, ICC and the Arbitration Institute of the Stockholm Chamber of Commerce to develop rules for the arbitration of environmental disputes.[12] Based on the "PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment," the Hague Rules on Business and Human Rights arbitration also include a well oriented process for arbitration resulting from human rights impacts of business activities, which includes climate change issues.

On a more general basis, contracts in sectors directly influenced by climate change, such as energy, construction, and extractives, in most cases have Arbitration clauses in them allowing an appropriate forum to resolve climate change disputes, also allowing tailoring of the process to address the nuances of climate change disputes effectively.

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[9] *See* Paris Agreement, December 2015, FCCC/CP/2015/10/Add.1.
[10] INTERNATIONAL BAR ASSOCIATION, Climate Change Justice and Human Rights Task Force Report, (2014), available at https://www.ibanet.org/MediaHandler?id=0f8cee12-ee56-4452-bf43-cfcab196cc04.
[11] Charles Qiong Wu, "*A Unified Forum? The New Arbitration Rules for Environmental Disputes Under the Permanent Court of Arbitration"* (2002) 3 Chi J Int'l L 263.
[12] *Id.* at 10.

IV. BENEFITS OR ADVANTAGES OF ARBITRATING CLIMATE CHANGE DISPUTES

There are multiple direct and indirect benefits arising from arbitrating climate change disputes. The 122 member PCA is the oldest institution resolving inter-state disputes. Therefore, it is widely accepted that it brings international recognition and acceptance, which results in immense trust in the court's functioning. The PCA has also administered multiple environment-specific disputes under various legal instruments such as the 1960 Indus Waters Treaty and the 1982 UN Convention on the Law of the Sea and bilateral agreements thereby having expertise in such disputes and streamlining the process.[13]

In ICJ proceedings, investors petition the state to take to court disputes against other states, thereby having scope for the growth of diplomatic insecurities. To eliminate the political instabilities and to increase the chances of investor's claims being recognized, arbitration is necessary. Further, more states are signatories to the New York Convention[14] than states recognizing the ICJ as compulsory. Also, arbitral tribunals having expertise and knowledge of environmental issues are more likely to grant an award in a shorter time than the ICJ would render a decision.[15]

Among other benefits such as the neutral platform and benefiting from the "New York Convention" which sanctions cross-border recognition and enforcement of arbitral awards, other significant advantages that arbitration offers in this area include increased tribunal accessibility, competence, and flexibility in terms of where an arbitration proceeding is held. Arbitral tribunals can set reasonable deadlines, consult experts, and sometimes even admit amicus evidence, and alter the process as needed based on the nature and extent of the dispute.

In ICC arbitrations, states and state entities have already filed claims against contractors in building disputes and suppliers in disputes related to energy issues. Similarly, states or state entities acting as respondents in ICC Arbitrations can seek restitution for environmental damages through counterclaims. Engagement with third-party views is another benefit under arbitration owing to

[13] PERMANENT COURT OF ARBITRATION, *Environmental Dispute Resolution*, available at https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution/ (Last visited on January 12, 2022).
[14] *See* New York Arbitration Convention, June 10, 1958, 330 UNTS 38. ("The New York Convention applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.")
[15] Risteard de Paor, "*Climate Change and Arbitration: Annex Time before there won't be A Next Time"* (2016) Journal of International Dispute Settlement, 2017, 8, 179–215, doi:10.1093/jnlids/idw025.

the complexity of these disputes, wherein they are often directly affected or stakeholders. It also leads to the reduction of myriad proceedings by providing a single efficient forum and allowing offers from investors to local stakeholders, thereby resisting opposition.[16]

V. ROLE OF INVESTMENT ARBITRATION

Investment arbitration is a process undertaken to resolve disputes between a foreign investor and the host State.[17] It is also known as "Investor-State Dispute Settlement" (ISDS). The main incentive for the foreign investor under such a procedure is the possibility of using the host State under independent and qualified arbitration resulting in the dispute getting resolved as well as receiving the grant of an enforceable award. This means that foreign investors get to solve disputes under international treaty protections and circumvent national jurisdictions as they might be biased and lack independence. However, a host state's consent is necessary for the foreign investor to initiate proceedings, which is often present in International Investment Agreements, Bilateral Investment Treaties (BITs), Free Trade Agreements, and other multilateral agreements.[18]

When the jurisdiction of said arbitration treaties include "all disputes relating to an investment", environmental and climate change disputes can also be addressed. Any behaviour of the state directly or indirectly harming the environment could be considered as posing harm to an investor's property, and termed as a violation of its "protection and security" obligation.[19] It has also been correctly contested that similar opportunities are available to the state as well through "reverse umbrella" clauses, obligating investors, through agreements, to comply with the state's domestic laws.[20] An example of a successful counterclaim is the *Perenco v. Ecuador* case wherein claims

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[16] *Id.* at 3.

[17] Faraz Alam Sagar & Samiksha Pednekar, *International Investment Arbitrations and International Commercial Arbitrations: A Guide to the Differences*, May 15, 2019, available at https://corporate.cyrilamarchandblogs.com/2019/05/international-investment-arbitrations-international-commercial-arbitrations-guide-differences/ (Last visited on January 13, 2022).

[18] Aceris Law LLC, *International Investment Arbitrations and International Commercial Arbitrations: A Guide to the Differences*, available at https://www.international-arbitration-attorney.com/investment-arbitration/ (Last visited on January 13, 2022).

[19] Pinsent Masons, *Resolving climate change disputes through arbitration*, available at https://www.pinsentmasons.com/out-law/analysis/resolving-climate-change-disputes-through-arbitration (Last visited on January 13, 2022).

[20] *See* Alison Ross, "*Lawyers Lead the Way in Fighting Climate Change?*" Global Arbitration Review (2015) (for further analysis regarding obligations in inter-state agreements)

against Ecuador were met with environmental counterclaims. As a result, Ecuador was awarded USD 41.5 million and USD 54.5 million.[21]

Another landmark arbitration case dealing with environmental disputes is the 2016 *Peter A. Allard (Canada) v. The Government of Barbados* case. The respondent state here was Barbados and the home state of the investor was Canada. Investment included the ownership of a wildlife sanctuary consisting of 34-acre natural wetlands. There were claims arising out of alleged environmental damage and indirect expropriation by the Government. Allard claimed that having failed to enforce environmental laws, the Government caused environmental degradation at the property of the investor. It was claimed that Barbados has "failed to take reasonable and necessary environmental protection measures and, through its organs and agents, has directly contributed to the contamination of the Claimant's eco-tourism site, thereby destroying the value of his investment."[22] The proceedings were initiated under the Barbados - Canada BIT of 1996, for the Reciprocal Promotion and Protection of Investments and conducted under the UNCITRAL Arbitration Rules, 1976. The decision was in favour of the Barbados government, on the grounds that there was no unfair or inequitable treatment, indirect expropriation or failure to protect foreign investment, thereby having no breach of the BIT.

Recent developments in this area indicate that States progressively view investment treaties as possible effective tools actively to encourage energy transition and to help combat climate change.[23] This will lead to higher accountability on part of both investors and states, also allowing the adoption of more sustainable methods and conducts to ensure a better climate. Countries are also actively striving to encourage investment in lower-carbon electricity sources as well as carbon capture and sequestration.

There are however certain disadvantages to Investment Arbitration. The enormous cost of investment arbitration plays a significant role in declining foreign investor's reliance on the process. A study undertaken on "International Centre for Settlement of Investment Disputes"

[21] Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6

[22] Peter A. Allard v. The Government of Barbados (PCA Case No. 2012-06)

[23] Freshfields Bruckhaus Deringer, *Arbitration and climate change*, available at https://www.freshfields.com/en-gb/our-thinking/campaigns/international-arbitration-in-2021/arbitration-and-climate-change/ (Last visited on January 13, 2022).

(ICSID) arbitrations that took place between FY-2011 and FY-2015 reveals that the average cost incurred by claimants were US$5,619,261.74, and US$4,954,461.27 for respondents.[24]

Another disadvantage arises from a rather noteworthy feature of most investment arbitration agreements and BITs - a "cooling off period" or "waiting period", wherein the investor and the host try to find amicable settlements. An OECD working paper estimated that 90 percent of BITs include such provisions.[25] These cooling off periods almost never lead to the settlement of disputes, thereby unnecessarily wasting time (frequently 6 months) in matters relating to climate and environment. Further, in some instances it is necessary for an investor to exhaust domestic remedies before initiating arbitration claims. The author strongly criticises these grounds on the simple fact that climate change issues are time sensitive and should not be subjected to provisions that are not proving to be beneficial. Instead, parties should be able to access arbitration proceedings as their first recourse, thereby reducing further detriments on the environment.

VI. ANALYSING THE NEED FOR AN INTERNATIONAL COURT FOR THE ENVIRONMENT

Presently, the major avenues to deal with problems of climate change disputes include the ICJ, the PCA or the International Tribunal for the Law of the Sea (ITLOS). There is no doubt that while not perfect, these international bodies have dealt with significant environmental issues. That being said, bodies such as the ICJ, have taken rather narrow approaches to issues raised in front of it, hinting at the possibility of not breaking new ground on climate change litigation. On top of that, states have not used existing mechanisms.[26] Moreover, only disputes between states are recognised by the ICJ and ITLOS, hence excluding individual, non-state actors and companies. This means that these parties cannot be plaintiffs or defendants in cases. Therefore, as the negative impacts of climate change are increasingly felt, people at large have been advocating for an International Court for the Environment, requiring international law to reflect these demands. It also requires the locus standi to expand beyond states, something that the International Court. For The

[24] Jeffery P. Commission, *How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years*, 2016, available at http://arbitrationblog.kluwerarbitration.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/ (Last visited on January 14, 2022).

[25] Joachim Pohl, Kekeletso Mashigo, Alexis Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey, OECD Working Papers on International Investment, 2012/02, OECD Publishing. http://dx.doi.org/10.1787/5k8xb71nf628-en*

[26] *Supra* note 10.

Environment (ICE) could account for. It is contested that the ICE would serve exclusively in the environmental area and be able to address the challenges of climate change litigation more efficiently and effectively, while also clarifying obligations of both state and non-state actors with regards to climate change. Owing to the current positions and questions of time, the IBA task force suggests an "ad hoc arbitral body (ICE Tribunal), which would build towards a permanent formal judicial institution (ICE)."[27]

Owing to the accepted fact that the establishment of ICE would require a lot of time, the author of this paper contends that it is not required. In the present reality, with the repercussions of climate change dooming over us, we cannot afford to waste any more time or even efforts on striving for new international bodies - the success of which is not even guaranteed - when there is a potentiality in upgrading and enhancing the already existing institutions. The international community should instead strive towards making regulatory and policy changes in the ICJ, PCA, ITLOS and other bodies. The role of PCA should be maximised and made more efficient by bringing about changes, while the ICJ should consider sub avenues to allow specialised environmental disputes among both state and non-state parties, thereby eliminating the current downsides. Further, specialised knowledge can be enabled by constituting the same mechanisms which would have been undertaken in the proposed ICE. The author therefore proposes that every feature of the envisioned ICE which could supplement the existing procedures and bodies shall be implemented. The PCA has immense scope for mitigating disputes and this shall not be under-utilized.

VII. CONCLUSION

As climate change-related actions become increasingly customary in nature, it is vital to remember that the impact of climate change is not restricted to geographical boundaries or environmental repercussions but is felt in a multitude of other ways. Domestic, regional, and international factors have created a nexus of complications that has inevitably led to a rise in climate change disputes. The growing role of arbitration in the struggle against climate change is becoming increasingly visible to the international community.

Throughout the course of the paper, the author has analysed the significant role of arbitration in resolving climate change disputes while also highlighting the benefits of arbitrating such issues

[27] *Id.*

compared to traditional methods. There has also been a critical appraisal of certain international frameworks and agreements, thereby a) proving the efficacy of arbitration; b) bringing to light the need for an arbitration annex as envisioned in the UNFCCC. The scope for Investment arbitration in climate change disputes has also been discussed while also providing some criticism on the cost and time involved in said process. Finally, contrary to recent ideas and task force recommendations, the paper has put forth the argument that instead of establishing a new international arbitrating body i.e., the ICE, efforts can be undertaken to reform and maximise the efficiency of current bodies such as the PCA. The means to do so have not been discussed in detail and are a prospect for future discourse on the topic.

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