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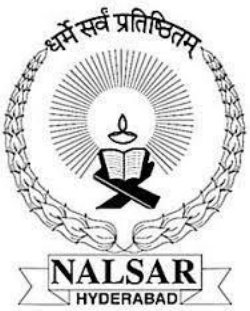

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EDITORIAL

The Editorial Board of Environmental Law and Practice Review ELPR takes immense pleasure in bringing forth Volume 10. The present volume is a collection of incisive scholarship that captures the evolving intersections of law, environment, and climate change. The eight articles in this volume critically examine themes ranging from the **Polluter Pays Principle, corporate accountability,** and **climate dispute resolution**, **green finance, climate sovereignty,** and **governance.** Together, they reflect a shared commitment to reimagining legal frameworks for the Anthropocene, one where environmental justice, economic governance, and human rights converge. As climate imperatives intensify, this volume seeks to advance informed, interdisciplinary dialogue that bridges scholarship with actionable pathways for a sustainable future.

In the first contribution, Fairy & Pancham Preet Kaur in *The Practicalities of the Polluter Pays Principle in India: Insights from the National Green Tribunal Cases*, offer a keen exploration of the Polluter Pays Principle (PPP) in India, tracing its journey from economic theory to a cornerstone of environmental jurisprudence. Through an analysis of Supreme Court and NGT decisions, it reveals how PPP has evolved from compensating for environmental damage to encompassing preventive and deterrent costs. The author highlights the tribunal's creativity in addressing practical challenges of quantifying environmental harm while noting inconsistencies in

its methods. Evaluating case laws, statutory frameworks, and enforcement gaps, the article underscores the urgent need for scientific assessment, transparency, and stronger institutional oversight to make PPP an effective tool for sustainable environmental governance.

Mridul Yash Dwivedi in *Balancing Right to Livelihood and Climate Justice: Judicial Responses to Socio-Economic Tensions in India*, extends the discussion on environmental accountability from the Polluter Pays Principle to the judiciary's evolving role in reconciling climate justice with livelihood rights. Through analyses of Arjun Gopal v. Union of India and State of Meghalaya v. All Dimasa Students Union, it explores how the Supreme Court balances ecological imperatives with socio-economic realities. While both judgments affirm principles like precautionary action, polluter pays, and inter-generational equity, they expose critical gaps in livelihood rehabilitation and policy coordination. Building on insights from the NGT's pragmatic use of PPP, this piece calls for a more integrated model of environmental governance linking judicial mandates with inclusive policy frameworks, technological innovation, and social equity.

Kanishk Srinivas in *Judicial Review of Big Public Projects: A Public Choice Theory Case Review*, interrogates a blind spot in India's environmental jurisprudence, that is, judicial deference to "big public projects". The article demonstrates how courts oscillate between assertive review and reluctant acquiescence when large, state-backed infrastructure is at stake. Through case studies on

Mopa, Tehri, Sardar Sarovar, the author links institutional pressures and interest-group dynamics to judicial restraint, then marshals Dworkin's political-inequality critique and public-choice theory to argue that such deference risks entrenching executive capture and under-protecting diffuse environmental interests. The article concludes that, far from being overreach, calibrated judicial review using PILs, expert committees and procedural innovations, remains vital to correct executive failures and to make PPP and livelihood sensitive remedies genuinely effective.

Maanyaa Gupta in *Piercing the Corporate Veil for Environmental Harm: Towards A Statutory Eco- Liability Regime in Indian Corporate Law*, interrogates how limited liability shields parent companies from environmental harms caused by subsidiaries, arguing Indian courts apply very stringent standards for piercing the corporate veil**.** Through Bhopal and other examples, and a comparative study of UK (Chandler, Vedanta, Okpabi) and Australia's stricter restitution models, the author demonstrates the procedural, informational and jurisdictional hurdles that the victims face. Treating the environment as a "silent stakeholder," the article urges a clear statutory eco-liability regime, ideally grafted into the Companies Act, thus featuring mandatory sustainability disclosures, profit-based restitution, curtailed due-diligence defences, and stronger enforcement. The goal will be to preserve corporate utility while making parent companies genuinely accountable for gross ecological harms.

Abhyudaya Yadav & Nitin Soni in *Transforming Climate Change Disclosures Regime: Evaluating and Reforming India's BRSR Framework for Holistic Sustainability*, critically examines India's Business Responsibility and Sustainability Reporting (BRSR) framework, emphasising its strengths, gaps, and potential as a climate disclosure tool. While India's move toward mandatory ESG and climate-related disclosures aligns with global trends, the regime remains largely investor-centric, under enforced, and uniform across sectors. Key challenges include weak enforcement of directors' environmental duties under Section 166(2) of the Companies Act, lack of locus standi for non-shareholder stakeholders, absence of sector- specific standards, and unverified, generic disclosures leading to greenwashing. The article recommends statutory reform through broader stakeholder participation, sectoral disclosure metrics, third-party verification, AI-enabled reporting, and corporate climate education, thereby re-casting the BRSR as a genuinely eco-centric, enforceable framework for sustainable corporate governance.

Paridhi Gupta & Khushi Bansal in *Arbitrating the Climate Crisis: International Mechanisms and National Responses*, explores the growing field of climate change disputes, driven by international frameworks like the UNFCCC and Paris Agreement**,** and the need for specialized arbitration mechanisms to address their technical and cross-border complexity. It analyses India's evolving approach, emphasizing the limitations of the NGT and showcasing the Kishenganga Arbitration as a model for balancing development

with ecological sustainability. The article also examines disputes in green finance**,** particularly green bonds**,** highlighting challenges of verification and greenwashing. It concludes by advocating for innovative, expert- driven, and inclusive ADR frameworks to align India's dispute resolution mechanisms with global sustainability goals.

Anubhuti Raje in *Breaking The Climate Deadlock: Reforming ISDS To End Corporate Impunity and Restore Sovereign Environmental Justi*ce, critiques the Investor-State Dispute Settlement (ISDS) system as a major obstacle to climate governance. Originally designed to protect foreign investors, ISDS has enabled corporations to challenge and extract compensation for sovereign environmental regulations, creating a "regulatory chill," especially in the Global South. Broad Fair and Equitable Treatment and indirect-expropriation doctrines permit claims against climate policies (Vattenfall, Rockhopper, RWE), undermining democratic and constitutional authority. The author urges for systemic reform such as climate-sensitive arbitration (Green ISDS), a climate sovereignty override, application of environmental necessity doctrine, constitution of climate-sensitive arbitration panels, and a global climate investment court (GCIC). The paper proposes a constitutionally integrated investment framework to align investment law with human rights, constitutional supremacy, and sustainability.

The Board of Editors extends its sincere gratitude to the Patrons, Advisory Board, Authors, and the Peer Reviewers Dr. Amit

Anand, Dr. Arup Kumar Poddar, Dr. Sanu Rani Paul, Dr. Neeraj Kumar Gupta, Dr. Gayathri D. Naik, Ms. Shachi Singh, Dr. Jiya Matharani for their time and invaluable support in the publication of this volume.

THE PRACTICALITIES OF THE POLLUTER PAYS PRINCIPLE IN INDIA: INSIGHTS FROM THE NGT CASES

Fairy & Pancham Preet Kaur♦*

Abstract

The polluter pays principle is essential to curb rising pollution and hold accountable the entities engaged in pollution-causing activities. Although its conceptual understanding is straightforward, that the polluter is liable to bear all the costs associated with the pollution, its actual implementation has raised many practical issues, which have been creatively addressed by the Supreme Court and the National Green Tribunal (NGT) in India. At first, this article discusses the background of the principle, its origin at the international level and its incorporation in India. Next, the circumstances in which it has been invoked so far and the kinds of costs imposed under it are explored. Its scope has expanded over time to include not just the curative cost, but also the preventive and deterrent costs. The main conundrum is how to calculate the cost or environmental compensation to be paid by the polluter under this principle. For this, the Apex Court and NGT have devised various methods to determine the quantum of compensation and costs to be paid by the polluter. The role of NGT is significant as it is a specialized forum to adjudicate

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environmental matters and has enlarged the application of the polluter pays principle to cover a variety of circumstances. This article systematically and critically discusses the various judgments and orders of the NGT to understand how the practical issues are addressed and what methods are devised to determine the costs under this principle. Their perusal highlights a lack of consistency and objectivity in the approaches adopted by the tribunal, respectively. Further, this article discusses how such orders are executed, and it evaluates the effectiveness of the implementation of this principle in India. Lastly, suggestions are provided on how this principle can be effectively applied.

Keywords: Costs, Methods, NGT, Polluter, Pollution, Polluter Pays Principle

1. INTRODUCTION

Pollution is one of the major environmental issues that the world is facing in today's era of industrialization and capitalism. To resolve this, the Polluter Pays Principle (PPP) emerged from an economic principle to a well-recognized legal principle. It is an example of the application of economics in the sphere of law. The genesis of PPP lies in the economic theory of externality expounded by Arthur C. Pigou in the book "The Economics of Welfare" in 1920.[1] The theory deals with the external impact of economic activities on society, called an externality, which the enterprise does not consider while estimating the cost/price of economic activity. The producer

[1] A.C. Pigou, *The Economics of Welfare* (2nd edn Macmillan 1924).

only considers the direct cost of the factors of production (i.e., private costs) and ignores the social or indirect costs which, in the end, have to be borne by people of the society in terms of the cost of healthcare and decreased quality of life because of the degrading quality of the environment. This is an example of a negative externality and gives an incorrect evaluation of the costs and prices of the goods or services. Thus, the government's intervention, in the form of levying taxes, fines, etc. on the polluter, can help in overcoming the negative externality. This would ensure that the cost of pollution is internalized, i.e., borne by the polluter like any other costs and not by external entities like the government or people. This is known as the internalization of costs.[2] PPP is based on this concept of 'cost internalization.'

In the 20th century, various reports appeared revealing the degradation of the natural environment due to reckless human activities, such as industrialization, and different environmental incidents. This led to a green movement urging leaders across the globe to come forward to deliberate on growing environmental concerns and formulate effective policies. Consequently, PPP emerged on the global front to combat the issue of pollution.

In 1972, OECD's Recommendation of the Council on Guiding Principles Concerning International Economic Aspects of Environmental Policies advanced the PPP as an economic principle

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2 Thomas Helbling, 'Externalities: Price Do Not Capture All Costs' (International Monetary Fund) <https://www.imf.org/external/pubs/ft/fandd/basics/38-externalities.htm#:~:text=Social%20costs%20grow%20with%20the,lead%20to%20lower%20production%20levels.>

for the first time.[3] It was realized that this would motivate the economic agents to judiciously use the scarce environmental resources and allocate the cost of pollution control.[4] Afterwards, the OECD made several recommendations on PPP and enhanced its scope with time. The Stockholm Declaration on Human Environment 1972 indirectly recognized PPP in its Principle 22, which obliges the States to develop the law concerning the liability towards pollution and environmental damage.[5] The comprehensive document on sustainable development, i.e., the Report of the World Commission on Environment and Development: Our Common Future, summarily called Brundtland Report, postulated that if pollution is recognized as a cost, the industries would be persuaded to take the necessary steps to improve the production and manufacturing process and minimize the pollution and effluent waste. It also discussed the very core concept of PPP i.e., cost internalization.[6] Thereafter, another landmark instrument, the Rio Declaration on Environment and Development (1992), explicitly recognized PPP and directed authorities at the national level to encourage the polluters to internalize the

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3 Christopher M Inwang, 'Polluter pays principle: A jus cogen or customary international law' (2021) 7/1 International Journal of Law <https://www.lawjournals.org/assets/archives/2021/vol7issue1/6-6-35-335.pdf >

4 OECD 'Recommendation of the Council on Guiding Principles Concerning International Economic Aspects of Environmental Policies' (26 May 1972) OECD Doc C(72)128, annex, pt. 4.

5 UNGA 'Report of the United Nations Conference on the Human Environment' (16 June 1972) UN GAOR, UN Doc A/CONF.48/14/Rev.1, p.no. 5, Chapter I, Principle 22. [Stockholm Declaration]

6 UNGA 'Report of the World Commission on Environment and Development: Our Common Future (1987)' (4 August 1987) UN GAOR, UN Doc A/42/251, Chapter 8, para 51 & 53. [Brundtland Report]

environmental costs. They were also directed to use economic instruments to ensure that the pollution cost is borne by the polluters, keeping in mind the interest of the public and the provision of smooth international trade and investment.[7] Hence, PPP has become an internationally accepted legal principle of environmental law and a principle of sustainable development.

The understanding of PPP has evolved since its inception. Originally, the OECD Recommendations of 1972 and 1974 defined PPP as the costs that must be borne by the polluter for measures to prevent and control pollution to keep the environment in an acceptable state.[8] Subsequently, PPP evolved and extended to internalize the costs of damage done to the environment.[9] It includes not just the direct costs to people or property, but also the environmental costs. Thus, the scope of PPP has been expanded from the ex-ante dimension to include both the ex-ante and ex-post dimensions. Ex-ante pollution cost means the prevention and control cost, that is, the cost incurred by the polluter before the occurrence of

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7 UNGA 'Report of the United Nations Conference on Environment and Development, Resolution 1' (14 June 1992) UN GAOR, A/CONF.151/26 (Vol. I), Chapter I, Annex. I, Principle 16. [Rio Declaration]

8 OECD 'The Polluter Pays Principle: OECD Analysis and Recommendations' OCDE/GD (92)8 (1992), p.no. 5 <https://one.oecd.org/document/OCDE/GD(92)81/En/pdf> assessed 20 April 2024.

9 OECD 'Recommendation of the Council Concerning the Application of the Polluter-Pays Principle to Accidental Pollution' (7 July 1989) OECD Doc C (89)88/Final <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0251>; OECD 'Recommendation of the Council on the Use of Economic Instruments in Environmental Policy' (31 January 1991) OECD Doc. C (90)177/Final <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0258>.

any pollution-causing event. Whereas the ex-post cost means the cost incurred after the occurrence of the pollution-causing event to compensate the victims and repair and remedy the environmental damage caused.[10] In other words, the trajectory of PPP suggests that the scope of PPP has been expanded from a 'partial internalization of costs' to a 'full internalization of costs.'[11]

2. ORIGINATION OF PPP IN INDIA'S LEGAL LANDSCAPE

In India, two major industrial disasters occurred – the Bhopal gas tragedy and the Oleum gas leak case, in which the industries were held liable to compensate. Although in these cases the Court had not used the expression 'polluter pays principle,' the decisions of the Supreme Court reflected the essence of the polluter pays principle, i.e., the polluter is liable to bear the loss caused by the pollution.

The source of PPP in India is the landmark decision of the Apex Court of India in the case of *M.C. Mehta v. Union of India*,[12] (*Oleum Gas Leak Case*) wherein it propounded the rule of absolute liability and refused to incorporate the rule of strict liability (evolved in the case of *Rylands v. Fletcher*[13]) into the Indian legal system because many changes have occurred in society since then. The Supreme Court said the enterprise engaged in a hazardous or inherently dangerous industry posed a future threat to the health and safety of the workmen and the

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10 Sroyon Mukherjee, 'How Much Should the Polluter Pay? Indian Courts and the Valuation of Environmental Damage' (2023) 35(3) Journal of Environmental Law <https://doi.org/10.1093/jel/eqad021>2024, pg. 340.

11 Nicolas de Sadeleer, *Environmental Principles From Political Slogans to Legal Rules* (Oxford University Press, 2002) pg. 42, 43.

12 A.I.R. 1987 S.C. 1086.

13 1868 L.R. 3 H.L. 330

people residing in the surrounding areas. Hence, it said that such an enterprise "*owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of the hazardous or inherently dangerous nature of the activity which it has undertaken.*"[14]

It was held that such an enterprise would be obliged to ensure that the hazardous activity was being conducted with the highest standards of safety. If the harm occurs, the enterprise would be "*strictly and absolutely*" held liable to compensate for it. The enterprise cannot take the defence/excuse that all reasonable care has been taken and that there has been no negligence on the part of the enterprise. The Supreme Court justified the liability by saying that the enterprise, performing the hazardous/inherently dangerous activity for profit, is allowed to operate on the condition that it would have to absorb all the costs arising on account of the accident, as an overhead. Moreover, such an enterprise alone has the requisite means to find the possibility of such hazards/dangers and prevent them.[15] Although the phrase 'polluter pays principle' was not explicitly used in the judgment, it was nevertheless premised on the PPP.

In the matter of *Union Carbide Corporation v. Union of India*[16] famously called the Bhopal Gas Leak case, the Supreme Court passed an order of compensation according to the terms of the settlement reached between the Union of India and UCC and directed the UCC to pay Rs. 750 crores. However, the Court said that the judgment of

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14 *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 1086 at 1099.
15 *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 1086 at 1099.
16 (1991) 4 SCC 584.

the Oleum gas leak case cannot be pressed to assail the settlement reached in this case.[17]

The PPP has been expressly incorporated into the Indian legal system by the judgment of *Indian Council for Enviro-Legal Action v. Union of India*[18] ('H' acid case or Bicchri case). It sheds light on the harsh reality of industrialization and how entrepreneurs and industrialists are only concerned with the profits, not the health of the people and the environment. In this case, some chemical industries in the Bicchri village of Rajasthan were producing 'H' acid, which generated sludge, a highly toxic and destructive waste. The sludge was thrown open in the surrounding areas, which polluted the land, groundwater and soil.[19] The Supreme Court sought the assistance of the National Environmental Engineering Research Institute (NEERI), the Rajasthan Pollution Control Board and the Union Ministry of Environment and Forest to study the situation and recommend the measures that need to be taken.[20] The reports established that the respondent industries were responsible for causing pollution.[21] The Supreme Court had considered the ratio of the Oleum Gas Leak case and the reports. On that basis, it held the respondents absolutely liable to pay compensation to the villagers because of the harm caused by them. They were also directed to remove the sludge from the affected area and pay the remedial cost to restore the underground water and

17 Ibid at 682, 683.
18 (1996) 3 SCC 212.
19 *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212 at 219.
20 Ibid 223, 225.
21 Ibid 240.

soil.[22] The Court introduced PPP, which implies that "*the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause the pollution, or produce the goods which cause the pollution…not the role of the Government to meet the costs*…."[23] It said that PPP had been stated in absolute words in the Oleum Gas Leak Case.[24]

In another landmark case of *Vellore Citizens Welfare Forum v. Union of India & Ors*,[25] the Supreme Court has read the PPP into the law of the land of India and inferred it from the provisions of the Constitution of India, the Water Act, the Air Act, and the Environment (Protection) Act, 1986. In the state of Tamil Nadu, some tanneries and industries were discharging untreated effluents into the environment, constituting roadsides, open lands, waterways and agricultural fields. This had also polluted the source of drinking water i.e., the river Palar.[26] Despite the assistance given by the Central Government to establish common effluent treatment plants, no steps were taken by the tanneries to build them and prevent pollution.[27] The Supreme Court, by applying PPP, held polluting industries absolutely liable to compensate for the environmental harm so caused. PPP means that it is the absolute liability of the polluter to bear the cost of compensation to the victims of pollution and the restoration cost of the degraded environment. The process of sustainable development

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22 Ibid 246.

23 Carolyn Shelbourn, 'Historic Pollution - Does the Polluter Pay?' (1974) Journal of Planning and Environmental Law.

24 *Indian Council for Enviro-Legal Action case* (n 18) 250.

25 (1996) 5 SCC 647.

26 Ibid 650.

27 Ibid 652.

includes, within its ambit, the cost of remedying the damaged environment. The Supreme Court said, "*The precautionary principle and the polluter pays principle have been accepted as part of the law of the land.*"[28] The Court had imposed the pollution fine of Rs. 10,000, which, along with the compensation, would have to be deposited in the Environment Protection Fund.

3. LEGAL FRAMEWORK ON PPP IN INDIA

The laws dealing with pollution and its remedies had already been in existence before the landmark judgement of *Indian Council for Enviro-Legal Action v. Union of India*.[29] The reflection of PPP is found in the general and special laws already existing in India, though such laws implicitly and partially uphold PPP.

For instance, there were already specific legislations such as the Water (Prevention and Control of Pollution) Act, 1974; the Air (Prevention and Control of Pollution) Act, 1981; the Environment (Protection) Act, 1986; and the Public Liability Insurance Act, 1991. These laws set up the administrative setup, like the central and state boards, and levy penalties to a limited extent. However, the monetary fines and damages provided in these statutes are insufficient to cover the holistic costs, including compensation to victims, compensation to restore the damaged environment, and punitive/deterrent costs.

The Indian Penal Code, 1860 contained some provisions to protect the health, safety, and convenience of the public by penalizing those acts

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28 *Vellore Citizens Welfare Forum v. Union of India & Ors*, (1996) 5 SCC 647 at 659.
29 (1996) 3 SCC 212.

that cause harm to the environment and endanger the lives of people. Those provisions are public nuisance (Section 268), making water dirty in the public spring or reservoirs (Section 272), impairing the quality of the atmosphere (Section 273), and negligence in handling poisonous substances (Section 284). However, they only focus on the punishing aspect and not on the remedying part. The procedural laws, such as the Bharatiya Nagarik Suraksha Sanhita 2023 in Section 152 and the Civil Procedure Code 1908 in Section 91, also provide the procedure to be followed to remove the public nuisance. The BNSS, though, provides a quick mechanism to remove public nuisance, but is insufficient in holding accountability. Specialized forums would more appropriately address the matters of pollution and environmental damage.

Further, pollution is also a form of civil wrong, in the sense of a tort committed against the entire community.[30] On the occurrence of environmental pollution, tort of nuisance, trespass, negligence, and the rule of absolute liability can be invoked, and the aggrieved person can claim damages or compensation, injunction, or all under the law of torts.[31] However, a principle was required to holistically address the harm occurring not just to the people but also to the environment.

The Constitution of India provides for the protection and preservation of the environment through its Preamble, fundamental duties, directive principles of state policies, and fundamental duties. Article 51(c) of the Constitution obliges the state to have regard to

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30 *M.C. Mehta v. Kamal Nath*, (2000) 6 SCC 213.

31 Dr. Paramjit S. Jaswal, Dr. Nishtha Jaswal, and Vibhuti Jaswal*, Environmental Law* 2 (5th edn., Allahabad Law Agency, 2021) pg. 23.

international law and treaties while dealing with one another. Further, Article 253 read with Entries no. 13 and 14 of the Union List provided in the seventh schedule to the Constitution empowers the Parliament to legislate any law to implement international treaties, agreements, and conventions or to implement the decisions arrived at any international conference, association, meeting, etc.[32] For example, the Air (Prevent and Control of Pollution) Act, 1981, and the Environmental (Protection) Act, 1886, were enacted by the Parliament to implement the decisions of the United Nations Conference on Human Environment held at Stockholm in 1972. From the perspective of environmental protection, the 42nd Amendment is very important, which added Article 48 A and Article 51 A(g) to the Constitution of India, which impose a duty upon the State and citizens to work on improving the environment, respectively. Article 21 of the Constitution guarantees the right to life to every citizen, and through the environmental judicial activism, the Honourable Supreme Court of India and High Courts have given green interpretations to this Article so as to include within its ambit the right to live in a healthy and pollution-free environment.[33] In exercise of these constitutional provisions, the PPP and various other environmental principles have emerged in an Indian environmental jurisprudence. Further, the duty to protect and improve the environment reflects that PPP should be an inherent aspect of every action.

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32 Ibid 46, 47.

33 *Rural Litigation and Entitlement Kendra, Dehradun v. State of U.P.*, A.I.R. 1985 S.C. 652; *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 1086; *T. Damodhar Rao v. S.O. Municipal Corporation Hyderabad*, A.I.R. 1987 A.P. 171.

Therefore, the above laws only partially reflect the PPP. The full environmental costs, i.e., the costs of preventing pollution, compensating the victims, and restoring the damaged environment, cannot be covered under these laws. PPP does not work in silos, rather it works hand in hand with all the laws mentioned above because the procedure, administrative setup, authorities, duties of the entities etc. are provided by them only. PPP merely sets the accountability of the polluter to internalize the pollution cost. This principle does not hinder developmental activities. Rather, it promotes the concept of sustainable development and emphasizes that any kind of industrial or developmental activity should not breach the standards of discharge or emission prescribed under the environmental laws and rules. Thus, PPP is not just applied for remedying the effects of pollution but also for preventing pollution.

The increasing environmental matters and their technicalities demanded a special authority to efficiently address the environmental matters and effectively apply the principles of environmental law. Thus, such a specialised authority or forum would also effectively apply PPP, compute the quantum of costs, and hold polluters liable to pay the cost. Such concern was also discussed in *Vellore Citizens Welfare Forum v. Union of India & Ors.*[34] Since no authority was set up, the Courts had to ensure the control of pollution and the protection of the environment. The need for environmental courts was realised. The 186th Law Commission Report on the establishment of the

[34] (1996) 5 SCC 647, para 20.

environmental courts provided that such courts must, *inter alia*, apply the PPP.[35]

Consequently, the National Green Tribunal Act, 2010 (hereinafter, NGT Act)has been enacted with the objectives of providing effective and expeditious disposal of cases relating to environmental protection and providing relief and compensation for damages.[36] It is the first legislation expressly embodying PPP as a necessary principle to decide environmental matters. Section 15 of the NGT Act puts PPP into effect by classifying the heads under which the polluter can be held liable to pay. Section 20 of the Act specifically requires that the order/decision/award of the NGT must follow the principle of sustainable development, the precautionary principle, and PPP.

The Central Government, exercising rule-making power under Section 6 of the Environmental (Protection) Act, 1986, has made various rules in which the PPP has been expressly incorporated. For instance, the E-Waste (Management) Rules, 2022, the Battery Waste Management Rules, 2022 and the Plastic Waste Management Rules, 2016 empower the Central Pollution Control Board and the State Pollution Control Board to impose environmental compensation

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35 Law Commission of India, *186th Report on Proposal to Constitute Environment Courts* (September 2003) <https://patnahighcourt.gov.in/bja/PDF/UPLOADED/BJA/MISC/440.PDF>

36 The National Green Tribunal Act, 2010 (19 of 2010), Preamble.

based on PPP for violating the 'Extended Producer Responsibility Targets.'[37]

From the discussion above on PPP, it is perceived that PPP is an environmental law principle, which means that the polluter is absolutely liable to bear all the costs associated with the pollution, i.e., the cost of preventing pollution, the cost of compensating the victims of environmental pollution, the cost of restoring and remedying damage to the environment, and the deterrent cost. This liability is irrespective of whether reasonable care has been taken by the polluter or not. This is the responsibility of the polluter, and the burden of incurring these costs should not pass on to the general public or government. This principle is concerned with compensating for the environmental pollution caused. This principle intends to become the inherent tendency of the people / industrialists / corporates / government to act cautiously and in a manner that minimizes pollution. Thus, it is not to be applied only by the Courts in adjudicating the environmental matters, but it should also be kept in mind by everybody. This article will now discuss the circumstances in which this has been invoked and the methods used to calculate the quantum of compensation.

4. CIRCUMSTANCES INVOKING PPP

To make polluters pay, first, it has to be established that the pollution is caused or would likely be caused. There would be either

[37] The E-Waste (Management) Rules, 2022, rule 22; The Battery Waste Management Rules, 2022, rule 13; The Plastic Waste Management Rules, 2016, rule 9.

existing pollution or potential pollution. The Court/NGT has interpreted 'pollution' in an expansive manner beyond what is defined in the statute to meet the practical complexities of environmental issues. The perusal of many judgments of the NGT shows that there is no systematic and singular pattern to determine pollution.[38] The PPP has been invoked even when there is no incidence of pollution. Thus, all the circumstances where PPP has been applied so far have been discussed henceforth.

4.1 Actual Pollution

This is the most obvious circumstance when the PPP is applied by the Court and the NGT. Most of the environmental legislations, such as the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981, and the Environment (Protection) Act, 1986, also define actual pollution. These Statutes define the actual pollution, i.e., when the water, air, or environment has been polluted because of any act of discharge or emission of harmful substances/pollutants. The Water Act defines water pollution as the contamination or alteration of the properties of water or the discharge of sewage/trade effluent or any substance that makes it unfit for use.[39] The Air Act defines air pollution as the presence of any air pollutant in the atmosphere.[40] The Environment

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[38] Harshita Singhal and Sujith Koonan, 'Polluter Pays Principle in India: Assessing Conceptual Boundaries and Implementation Issues' (2021) 7/2 RGNUL Student Research Review <https://www.rsrr.in/_files/ugd/286c9c_b342d259e93e4d1386590f54f8b49ae8.pdf?index=true>

[39] The Water (Prevention and Control of Pollution) Act 1974, s 2(e).

[40] The Air (Prevention and Control of Pollution) Act 1981, s. 2(b).

(Protection) Act, 1986 defines environmental pollution as the presence of any environmental pollutant in the environment, which includes air, water, land, and the inter-relationship between them and living creatures.[41]

In landmark cases like *Indian Council for Enviro-Legal Action v. Union of India*[42] and *Vellore Citizens Welfare Forum v. Union of India & Ors.*,[43] PPP has been invoked in the event of actual pollution caused by industries. In the *Delta Co. Case*,[44] the ship M.V. RAK, carrying coal, fuel oil and diesel, sank in the Arabian Sea in August 2011, causing an oil spill into the sea and marine pollution. This affected the seawater, mangroves, aquatic life, marine ecology, the life of the people living along the shore and tourism in that area. Hence, the NGT held the respondent companies liable for damaging the marine environment on the Bombay coast.[45]

The violation of the laws and regulations and the violation of the emission/discharge standards set up by the Pollution Control Board are the causes of the occurrence of pollution. In such situations also PPP has also been applied to hold the violators liable. However, sometimes a mere violation of rules may not cause significant harm to the environment and people, but creates an apprehension that if such a violation continues, then it may result in significant damage to the

41 The Environment (Protection) Act 1986, s. 2(c), 2(a).
42 (1996) 3 SCC 212.
43 (1996) 5 SCC 647.
44 *Samir Mehta v. Union of India*, 2016 SCC Online NGT 479.
45 'Samir Mehta v. Union of India & Or' (WWF India, 23 August 2016) <https://www.wwfindia.org/?26683/Samir-Mehta-v-Union-of-India--Ors> assessed 6 November 2024.

environment and people. Thus, an issue arose as to whether PPP can be invoked in the absence of any actual damage to any person, property, or environment. In the case of *Deepak Nitrite Ltd. v. State of Gujarat*,[46] certain industries exceeded the standards provided by the Gujarat Pollution Control Board for discharging effluents into effluent treatment plants, and the Supreme Court said that a mere violation of the law would not amount to degradation of the environment. Hence, PPP cannot be invoked in the absence of any damage to the environment.[47] However, in *Research Foundation for Science (18) v. Union of India*,[48] the Supreme Court had clarified the decision of the *Deepak Nitrate case* by saying it would not be a correct proposition to say that the payment under PPP could not be ordered in the absence of any actual damage to the environment. It has been said that exemplary/penal damages can be awarded.[49] This case involves the illegal import and dumping of hazardous waste, which has the potential to degrade the environment. In another matter of *Sterlite Industries (I) Ltd. v. Union of India*,[50] the copper smelter plant failed to maintain the emission and effluent standards and continued to operate without renewing its permission. Thus, the Supreme Court imposed compensation, though the plant was allowed to operate owing to its economic importance.[51] Likewise, in *Goel Ganga Developers (India) (P) Ltd. v. Union of India*,[52] the Supreme Court, by applying PPP, imposed

46 (2004) 6 SCC 402.
47 Ibid 408.
48 (2005)13 SCC 186.
49 Ibid, para 30.
50 (2013) 4 SCC 575.
51 *Sterlite Industries (I) Ltd. v. Union of India*, (2013) 4 SCC 575, para 40, 42.
52 (2018) 18 SCC 257.

damages on the developers for performing the construction activities in violation of the conditions of the environmental clearance.[53]

The industries require the consent of the State Pollution Control Board before opening.[54] The failure to obtain the consent of the Board is another violation where the PPP has been widely applied.[55] In the case of *The Proprietor M/s. Varuna Bio Products v. The Chairman Tamil Nadu Pollution Control Board*,[56] even though the chemical industry had been operating without obtaining the requisite consent, no effluents were released from the unit. Still, the NGT imposed Rs. 25,000 under PPP. This case again illustrates that PPP can be invoked on the mere violation of the law, irrespective of any damage caused to the environment.[57] In the case of *Krishan Kant Singh v. Triveni Engineering Industries Ltd.*,[58] the sugar and distillery company, Triveni Engineering Industries Ltd., was held liable for discharging the effluents on the land and polluting the groundwater and the river Ganga. It had violated the standards for the discharge. For some period, it operated without the consent of the Board. After obtaining the consent, it operated in violation of the conditions of the consent order. Hence, NGT imposed the environmental compensation of Rs. 25 Lakhs. In another case of *Sarav Shikshit Evam Berojgar Janhit Sangharsh Samiti Barmana v. State of*

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53 Ibid para 57.

54 The Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974), s. 25; The Air (Prevention and Control of Pollution) Act, 1981 (14 of 1981), s. 21.

55 Centre for Science and Environment, *Green Tribunal, Green Approach: The Need for Better Implementation of the Polluter Pays Principle* (February 2018) <https://www.cseindia.org/green-tribunal-green-approach-8500>.

56 Appeal No. 84 of 2015 (SZ).

57 Singhal and Koonan (n 38) 40.

58 O.A. no. 317/2014, Judgment dated December 2015.

Himachal Pradesh,[59] a unit of a cement company was violating the prescribed parameters and had not maintained the equipment, resulting in air and noise pollution. The company claimed that it has planted numerous saplings in the area and installed filters as a part of corporate social responsibility. Yet, NGT imposed the compensation on the company that would have to be utilized by the Board for taking remedial measures to improve the environment. NGT observed, "*It is not a Corporate Social Responsibility… but it is a statutory requirement that it must maintain its operations of manufacturing strictly within the prescribed parameters at all the relevant times…. Wherever industry violates the conditions of the consent order, its liability to pay environmental compensation automatically arises.*"[60] Besides, the applicants, who were the residents of the area, claimed damages for the health hazard created by the company. However, no evidence was led to prove the individual loss to persons/property in that area, therefore, the applicants were not granted individual compensation under Section 17 of the NGT Act.

4.2 Waste mismanagement

Waste mismanagement is another growing issue for which PPP has often been invoked. In the case of *Kudrat Sandhu v. Govt. of NCT*,[61] the NGT resorted to PPP to hold the individuals liable to pay the penalty for not segregating the waste and asked the Municipal Corporation to penalize those individuals who did not segregate

59 O.A. No. 157/2014, decided in December 2015, National Green Tribunal.
60 Ibid para 13, 19.
61 OA No.281 of 2016, decided on 10th August 2017.

waste.[62] In *Gaurav Jain v. State of Punjab and Ors*,[63] the NGT gave liberty to the authorities to impose the penalty on the people responsible for generating municipal solid waste and utilize the funds generated for effective disposal of municipal solid waste.[64]

4.3 Deemed Pollution

Certain acts, inherently polluting in nature, are continuously done by many individuals, but individually, do not cause pollution on a large scale or destroy the environment. In such cases, it is difficult to prove 'pollution in law', i.e., the actual violation of laws. However, the cumulative effect of those individual actions seems huge and raises the risk of future pollution, and it is difficult to attribute the liability to any one or more polluters. For example, several tourists drive to a hilly spot, which is an eco-sensitive zone. An individual traveler may not be causing enough emissions in the atmosphere through their car. But if we see the cumulative effect of several cars traversing that area, there might be significant emissions from the cars in that atmosphere. Not only pollution, but the biodiversity of that area is also interfered with. Therefore, an eco-tax is imposed on every individual travelling in that area through their vehicle, and all the amount collected from the eco-tax is utilized for the maintenance of that area and the prevention of pollution. In one article,[65] this approach has been termed as a '*deemed to be polluting'* approach, which means that every individual is assumed to

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62 Centre for Science and Environment (n 55) 17.

63 OA No. 106/2013, order dated 3 September 2013, NGT (Principal Bench).

64 Lovleen Bhullar, 'The Polluter Pays Principle: Scope and Limits of Judicial Decisions' in Shibani Ghosh (ed), *Indian Environmental Law: Key Concepts and Principles* (Orient BlackSwan, 2019), 171.

65 Singhal and Koonan (n 38) 39-41.

be a polluter for a specific area or purpose, and he/she has to pay a certain amount for that cause. Thus, the 'pollution' has been given expansive construction beyond the statutory boundaries. By invoking PPP, the pre-emptive costs are imposed to improve the environment and prevent pollution. This is different from the traditional approach, in which PPP is invoked when the pollution incident happens once, causing damage to the environment, people or property. Thus, deemed pollution involves the cases of "*continuous, incremental and decentralized pollution*."[66]

This approach is discerned in the case of *Court on its own motion v. State of Himachal Pradesh*.[67] In this matter, NGT took suo moto cognizance of the destructive impact of heavy tourism at the popular Himalayan range, Rohtang Pass. It had applied PPP and directed that the persons travelling to the glacier of Rohtang Pass would have to pay Rs. 100 for travelling via heavy vehicles, Rs. 50 for light vehicles and Rs. 20 for CNG or electric buses. All the vehicles travelling to that region are required to deposit the amount as per the kind of vehicle into the Green Tax Fund. The funds so collected would be used for the development of the area.[68] In another matter concerning the haphazard waste generation, i.e., *People for Transparency Through Kamal Anand v. State of Punjab*,[69] NGT directed the households, shops, hotels, or industrial buildings in one of the districts of Punjab to deposit a

66 Singhal and Koonan (n 38) 39, 40.
67 2014 SCC Online NGT 1.
68 Ibid 53, 54.
69 2014 SCC Online NGT 6893.

particular sum, like the house/property tax.[70] In another matter concerning the haphazard waste generation, i.e., *People for Transparency Through Kamal Anand v. State of Punjab*,[71] NGT directed the households, shops, hotels, or industrial buildings in one of the districts of Punjab to deposit a particular sum, like the house/property tax.[72]

4.4 Industrial disaster while handling hazardous substances

The PPP is also applied in the cases of hazardous industrial accidents where sudden discharge or leakage of pollutants or hazardous substances causes serious harm to the nearby environment. For example, the Oleum gas leak and the Bhopal gas leak cases. Similarly, in *In re: Gas Leak at LG Polymers Chemical Plant in RR Venkatapuram Village, Visakhapatnam in Andhra Pradesh,*[73] known as the Vizag Gas case, the hazardous leakage from LG Polymers India Ltd. caused the death of 12 persons, hospitalized many, and damaged the nearby environment and natural territory. The NGT took suo motu cognizance based on the reports published in the media and held LG Polymers strictly and absolutely liable for the loss of life and property and for destroying the environment. The scientific reports revealed that LG Polymers did not have the requisite environmental clearance and did not look after the storage tank. The NGT also indicated the failure of the authorities.

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70 Ibid 34.
71 2014 SCC Online NGT 6893.
72 Ibid 34.
73 2020 SCC Online NGT 129, decided on 1-6-2020.

4.5 Where the livelihood of the communities is affected

Sometimes, inconsiderate industrial and developmental projects not only cause harm to the environment, but the livelihood of the people who used to work near that area is also affected because of the consequent destruction caused to the environment. The loss of livelihood due to the degradation of the environment is another circumstance where PPP has been applied. Thus, the polluter has to adequately compensate those whose livelihoods have been affected. However, one-time compensation would not fully compensate for the loss. Rather, they should be given new work opportunities.

For instance, in *Ramdas Janardan Koli v. Ministry of Environment and Forests*,[74] the companies' expansion activities at the port were affecting the livelihood of the fishing community in a district of Maharashtra. Nearly 1,630 families were affected due to the loss of their livelihood earnings. Consequently, a compensation of Rs. 95 crore was imposed by the NGT on the three companies, namely, JNPT, CIDCO, and ONGC and the said amount was directed to be divided equally among the affected families. The companies were also directed to pay Rs. 50 lakhs for the restoration of the environment.[75] In another case of *Hazira Macchirmar Samiti v. Union of India*,[76] the Hazira Fishermen Association filed a petition before the NGT challenging a multi-crore infrastructure project damaging the ecology and mangroves in the area and impacting the livelihood of the fishing

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74 Application No. 19/2013 (WZ), National Green Tribunal, Dated 27th February 2015.

75 Ibid, para 77.

76 Appeal no. 79/2013, Dated January 8, 2016.

community, as they had been unable to fish in the inter-tidal regions. An allegation was made that the Environmental Clearance was inconsiderately granted. The NGT had imposed a penalty of Rs. 25 crores, however, without detailing the method to determine it.[77]

4.6 Holding the State authorities accountable for environmental pollution

Holding the government and the state authorities liable for the pollution caused by the entities or individuals is another circumstance recognized by the NGT, which is a deviation from the conventional approach of PPP, i.e., to hold the polluter liable to bear the cost of pollution. This highlights the deterrent and punitive approach of PPP against the inconsiderate state authorities who fail to take preventive steps regarding pollution and recklessly grant permission to industries and projects. In the instance of *Centre for Environment Protection, Research & Development v. State of M.P. and Ors.*,[78] the state authorities did not take any measures to ameliorate the rising vehicular pollution in Indore. Because of this carefree attitude, the NGT directed the Madhya Pradesh government to place a security of Rs. 25 crores before the Registrar of the Principal Bench of NGT, which was to be attached and utilized in case it further fails to make necessary efforts towards the prevention of pollution. The bench made a significant observation that the State can be held liable according to PPP for its failure to ensure adherence to the law for the prevention of pollution.[79]

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77 Ibid 19.
78 OA No. 1 of 2013 [CZ], National Green Tribunal, Dated August 3, 2015.
79 Centre for Science and Environment (n 55) 14.

In such cases, NGT treats government officials / authorities / bodies as polluters. In the matter of *M/s Cox India Ltd v. M. P. Pollution Control Board and Anr.*,[80] the regional officers of the State Pollution Control Board were regarded as polluters because they failed to furnish the correct information on the condition of the distillery unit for the rectified spirit, which prevented the NGT from acting against pollution. In *Manoj Misra v. Delhi Development Authority and Ors.*,[81] the regulatory authorities in Delhi permitted the Art of Living Foundation to organize an event on the floodplains of Yamuna, which resulted in damage to the fragile ecosystem of Yamuna Floodplains. Hence, the NGT imposed a punitive fine on the Delhi Development Authority and the Delhi Pollution Control Committee due to their failure to observe their statutory duty. Besides, a fine of Rs. 5 crore was imposed on the Foundation for restoring the floodplains of Yamuna.[82] The NGT has asserted that delegating responsibility to the states would incentivize them to monitor environmentally risky activities.[83] The states would devise policies to prevent and penalize pollution.

The onus to pay under PPP can also be put on the State in cases where it is difficult to identify the polluter or when the polluter

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80 Application No. 10/2013, judgment dated 9 May 2013, NGT (Central Zone Bench), para 27.

81 OA No. 65/2016, order dated 9 March 2016, NGT (Principal Bench) (Art of Living case).

82 Usha Tandon, 'Green Justice and the Application of Polluter-Pays Principle: A Study of India's National Green Tribunal' (2020) 13/1 OIDA Journal of Sustainable Development <https://oidaijsd.com/wp-content/uploads/2020/12/13-01-03-31.pdf>

83 Barbara Luppi, Francesco Parisi, and Shruti Rajagopalan, 'The rise and fall of the polluter-pays principle in developing countries' (2012) 32/1 International Review of Law and Economics <https://doi.org/10.1016/j.irle.2011.10.002>

corporation has become insolvent.[84] The government also has to step in to pay in cases where the polluter fails to pay the fine, whereas the circumstances demand an immediate payment of compensation to the victims.[85] It can, later on, recover the amount from the polluter.[86] In *Indian Council for Enviro-legal Action and Ors. v. Union of India and Ors.*,[87] the industries discharged the untreated industrial effluents into the river Nakkavagu, which resulted in the pollution of sub-terrain water and damage to the crops of the villagers. On the failure of the polluting industries to pay for the loss, the Supreme Court directed the state government to pay part of the total compensation amount.

In the majority of cases discussed above, it is deduced that although the term 'pollution' is more associated with the result of the activities carried out by industries, enterprises or corporations, individuals can also be held liable under PPP.[88] Even government officials/authorities/bodies can be held liable under PPP.

5. Kinds of Costs Covered under PPP

The payment of environmental compensation by the polluter is the basis of PPP.[89] The study of the evolution of PPP shows that its

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84 Centre for Science and Environment (n 55) 15.

85 Luppi, Parisi and Rajagopalan (n 83) 135, 136.

86 The Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974), s. 33(4); The Air (Prevention and Control of Pollution) Act, 1981 (14 of 1981), s. 22A (4).

87 (2007) 15 SCC 633, para 8.

88 *Kudrat Sandhu v. Govt. of NCT* OA No.281 of 2016, decided on 10th August 2017; *Gaurav Jain v. State of Punjab and Ors* OA No. 106/2013, order dated 3 September 2013, NGT (Principal Bench); *Centre for Environment Protection, Research & Development v. State of M.P. and Ors.* OA No. 1 of 2013 [CZ], National Green Tribunal, Dated August 3, 2015.

89 Ashima Sharma, Sukanya Singh & CAM Disputes Team, 'What is the Cost of Environmental Breaches? A Look at the Evolving Jurisprudence of

scope has been expanded from the ex-ante dimension to include both the ex-ante and ex-post dimensions. In another significant case on PPP, i.e., *M.C. Mehta v. Kamal Nath*,[90] the Supreme Court said that the polluter would be liable to pay compensation for restoring the ecology and environment and to pay damages to the victims of pollution. Besides, he could be held liable to pay exemplary damages to create a deterrent effect on other potential polluters.[91] Section15 of the NGT Act, 2010 provides that the NGT can order the polluter to pay under any or all of the heads, viz, a) Relief and compensation to the victims of the pollution or other environmental damage happening under the Acts provided under Schedule I; b) cost for restitution of the damaged property; c) cost for the restitution of the environment.[92] Based on the decisions of the Supreme Court and NGT, the following costs are covered under PPP:

5.1 Cost of Compensating the Victims of Environmental Pollution: It is an ex-post cost and is punitive. This kind of cost is usually imposed wherever any matter of environmental pollution arises.

5.2 Cost of Restitution and Restoration of the Environmental Damage: In the case of *Ajay Kumar Negi v. Union of India*,[93] the

Environmental Compensation' (Cyril Amarchand Mangaldas, 29 June 2023) <https://disputeresolution.cyrilamarchandblogs.com/2023/06/what-is-the-cost-of-environmental-breaches-a-look-at-the-evolving-jurisprudence-of-environmental-compensation/>

90 (2000) 6 SCC 213.

91 Ibid 224.

92 The National Green Tribunal Act, 2010 (19 of 2010), s. 15.

93 OA No. 183 (THC) of 2013, National Green Tribunal, 7 July 2015.

NGT explained, "*The 'Restitution' is* an *act of making good or giving the equivalent for any loss, damage or injury while 'restoration' is the act of restoring, renovating or re-establishing something close to its original condition, like restoring a damaged habitat.*"[94] This is again an ex-post cost and punitive in nature.

5.3 Cost of Preventing and Controlling Pollution: Under this kind of cost, the polluters are held liable to pay pollution charges, fines, taxes, and other associated costs as a preventative measure to improve the environment and avoid any future acts of pollution.[95] In the case of *Permanand Klanta v. State of Himachal Pradesh*,[96] which deals with air pollution in Himachal Pradesh, the NGT had imposed an environmental compensation of Rs. 500 to be paid by those entering heavy traffic areas in Shimla like Mall Road via vehicles and directed that the authority could collect the said amount to utilize it for preventing and controlling the pollution in Shimla.

5.4 Exemplary cost to create a deterrent effect: This is a punitive cost imposed to create a deterrent effect on other potential polluters. In the cases of *M.C. Mehta v. Union of India*[97] (Oleum Gas leak) and *M.C. Mehta v. Kamal Nath*,[98] the Supreme Court held that such exemplary and deterrent costs could be imposed on the polluters.

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94 Ibid para 21.
95 Tandon (n 82) 40.
96 OA No. 253 (THC)/2013, National Green Tribunal, 10 December 2015.
97 A.I.R. 1987 S.C. 1086.
98 (2000) 6 SCC 213.

5.5 Remedial Steps to be undertaken by the polluter in lieu of compensation: This is a new dimension of PPP wherein, instead of or besides levying costs on the polluter, the polluter is directed to undertake remedial measures to restore and protect the environment. This is different from the normal practice of imposing monetary compensation. In the case of *Shiv Prasad v. Union of India*,[99] the Superintendent of Police and the Deputy Commissioner were directed by the NGT to ensure that the industries remove all the slag stored in the river or on the river bed.[100] Sometimes, the remedial steps are ordered in addition to the monetary compensation.

6. METHODS OF CALCULATION OF COMPENSATION UNDER PPP

The real conundrum is how to determine the quantum of environmental compensation to be paid by the polluter. The analysis of numerous judgments of the Court and NGT shows that there is no uniform method to quantify the amount payable under PPP. The Court and NGT have devised the methods as per the needs of the matter at hand, or as per the precedents set by the earlier decisions, or as per their wisdom and discretion. The methods to compute the amount payable as per PPP are discussed below:

6.1 Method of Guesswork:

The guesswork method implies that the Court/NGT arrives at the amount based on subjectivity, sans any defined rationale, method,

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[99] 2014 SCC Online NGT 3044.
[100] Singhal and Koonan (n 38) 47.

or principle. The amount is determined without making any quantitative assessment of the environmental damage.[101] This method originated owing to the complexities involved in determining the damage with exactitude and the lack of a proper scientific report to estimate the damage. Thus, guesswork is used; however, it is guided by the apparent scale of damage, capacity of the polluter and the kind of damage caused.

For instance, in the case *of Samir Mehta v. Union of India*[102] (Delta Co. Case), an unseaworthy ship carrying coal and cargo sank and caused marine pollution. The NGT found it difficult to determine the amount of pollution with exactitude and precision, and hence, the computation was based on guesswork. It imposed the cost of Rs. 100 crores on the Panama-based shipping company and its two Qatar-based sister concerns for their default, negligence and continuous pollution caused to the marine environment. The cost of Rs. 5 crore was also imposed on the Adani Enterprises for choosing such a kind of ship to ferry coal.[103] In *Naim Sharif Hasware v. M/s Das Offshore Co.*,[104] the respondent, undertaking the development of an offshore fabrication yard, defied the steps of the environmental impact assessment process, destroying mudflats and mangroves. The NGT imposed a fine of Rs. 25 crore, deeming it 'just and proper,' without

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101 Centre for Science and Environment (n 55) 10.

102 2016 SCC Online NGT 479.

103 'Samir Mehta v. Union of India & Or' (WWF India, 23 August 2016) <https://www.wwfindia.org/?26683/Samir-Mehta-v-Union-of-India--Ors> assessed 6 November 2024.

104 Application No.15(THC) of 2014, judgement pronounced in December 2014.

explaining how the amount was determined.[105] However, the Supreme Court has put a stay on this order as of now.[106]

The NGT has justified this method because of the lack of exact data on the environmental damage or failure of the responsible agencies to provide necessary data & information. In *Deshpande Jansamsaya Niwaran Samiti v. State of Maharashtra*,[107] the Maharashtra Pollution Control Board failed to provide the details of air and water quality assessment to determine the environmental damage and the impact of non-compliance in the operations of Municipal Solid Waste, and thus, out of helplessness, the NGT justified the use of this method. Likewise, in the case of *Gurpreet Singh Bagga v. Ministry of Environment and Forests and Ors*,[108] the governments of Haryana and Uttar Pradesh failed to provide a report on the damage caused by the illegal sand mining on the river banks and bed of Yamuna in the district of Saharanpur, and the amount required for the restoration and restitution of the environment. Thus, the NGT was compelled to apply the guesswork method. While imposing the cost on an approximate basis, it observed, "*It is not possible to determine such liability with exactitude but that by itself would not be a ground for absolving the defaulting parties from their liability.*"[109]

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105 Centre for Science and Environment (n 55) 11.
106 Civil appeal no(s). 3218/2015.
107 2014 SCC Online NGT 1310.
108 2016 SCC Online NGT 92.
109 Singhal and Koonan (n 38) 43.

6.2 Calculation based on a certain percentage of the cost, sale proceeds, turnover, etc.:

There are numerous cases of the Supreme Court as well as of the NGT, wherein the amount of compensation under PPP has been imposed as a certain percentage of the project's cost, annual turnover, sale proceeds or net-worth. The percentage again depends on the kind and quantum of harm caused and the size of the polluter. However, it is found that the Court/Tribunal have used the percentage set in the earlier decision as a precedent for future matters irrespective of the difference in the kind and extent of environmental damage in each case.

In the matter of *Goa Foundation v. Union of India*,[110] the Supreme Court, considering the irregularities in the iron ore mining in Goa, directed the lessees to deposit an amount of 10% of the value of the mineral extracted towards the Goan Iron Ore Permanent Fund. The Court relied on the sale proceeds to determine the compensation because the lessees earn out of the sale proceeds of the minerals excavated by them.[111] Later, 5% of the cost of the project became a benchmark for NGT.[112] In the case of *Forward Foundation v. State of Karnataka*,[113] two companies were held liable for carrying out construction in the Special Economic Zone before getting environmental clearance and later, on getting the clearance, failed to comply with the conditions stated therein. The NGT acknowledged

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110 Writ Petition (Civil) No. 435 of 2012, Supreme Court of India, 21 April 2014.
111 Centre for Science and Environment (n 55) 10.
112 Ibid 8.
113 OA No. 222 of 2014, National Green Tribunal, Dated 7th May 2015.

that although it would be difficult to determine the amount of compensation payable with exactitude, such difficulty should not prevent it from imposing a penalty. It referred to the case of *Goa Foundation* to enunciate the principle of directing a deposit of a certain percentage of the project's cost in the first instance on a provisional basis.[114] However, it chose to impose 5% of the project cost at the first instance, as 10% seemed to be somewhat higher.[115] However, in *Mathew Thomas v. Kerala Pollution Control Board & Ors.*,[116] the Southern Bench of NGT had imposed 10% of the company's annual turnover for violating the terms of environmental clearance.[117]

6.3 Assistance of the experts to determine the final amount:

The environmental matters are technical, and therefore, the Court/Tribunal usually takes the assistance of the experts or forms a committee to determine the amount that the polluter is liable to pay. Until the experts' report is formed, the Court/Tribunal initially imposes some provisional amount. When the report is prepared and submitted, the final amount is determined based on that report.[118] There are numerous cases, such as *Indian Council for Enviro-Legal Action v. Union of India*,[119] *Sterlite Industries (I) Ltd. v. Union of India*,[120] *Samir Mehta v. Union of India*[121] etc. wherein the Supreme Court/NGT, as the case

114 OA No. 222 of 2014, National Green Tribunal, Dated 7th May 2015, pg. 100.
115 Ibid 103.
116 Original Application No 168 of 2015. Dated December 21, 2015.
117 Ibid para 24.
118 Centre for Science and Environment (n 55) 8.
119 (1996) 3 SCC 212.
120 (2013) 4 SCC 575.
121 2016 SCC Online NGT 479.

may be, took the assistance of the National Environmental Engineering Research Institute (NEERI) to determine the quantum of actual environmental damage. In the case of *Jalbiradari v. MoEF*,[122] the NGT had entrusted the job of calculating the final amount to the environmental clearance authority, i.e., the State Level Environment Impact Assessment Authority (SEIAA), and ordered an interim amount of Rs. 25 lakh, which was required to be adjusted with the final amount.[123]

However, sometimes the amount imposed by the Court/Tribunal differs from the amount of actual damage estimated by the experts. For instance, in the case of *Ajay Kumar Negi v. Union of India*,[124] the NGT levied an initial amount of Rs. 5 crores on the company for damaging the forest area and violating the conditions of environment clearance while developing the hydroelectric project in the Tidong basin of Himachal Pradesh. Based on the reports of the Committee, it was found that the amount imposed was not proportional to the amount of actual damage, which was far less than the penalty amount, and the NGT subjectively arrived at the disputed amount.[125]

Further, there are certain cases where NGT has not considered the experts' report or has completely rejected it.[126] For instance, in the case of *Forward Foundation v. State of Karnataka*,[127] the NGT did not

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122 Appeal no. 7 of 2015, pronounced on 31st May 2016, Principal Bench of NGT.
123 Centre for Science and Environment (n 55) 14.
124 OA No. 183 (THC) of 2013, National Green Tribunal, 7 July 2015.
125 Centre for Science and Environment (n 55) 10.
126 Ibid 9.
127 OA No. 222 of 2014, National Green Tribunal, Dated 7th May 2015.

follow the committee's report as it was vague and only discussed the qualitative observations.[128] Likewise, in *S.P. Muthuraman v. Union of India*,[129] the NGT rejected the committee's report, and the initial penalty continued.[130] The NGT, in *Benzo Chem Industries Private Limited v. Arvind Manohar Mahajan & Ors.*,[131] imposed damages of Rs. 25 crore based on the company's turnover without paying heed to the report of NEERI, which found compliance by the company. The non-observance of the principle of natural justice also irked the Apex Court, and the impugned order of the NGT was quashed.[132]

6.4 Imposing a fee/compensation charge as a preventative measure:

The use of PPP as a policy instrument to levy a fee or compensation charge as a pre-emptive measure is commendable move by NGT.[133] The PPP is also applied in cases of potential pollution to internalize the costs of prevention and control of environmental harm, viz, *ex-ante* costs. This method follows a decentralized approach as the charge is imposed on every individual doing a particular act and is thus

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128 Centre for Science and Environment (n 55) 34.

129 O.A. No. 37/2015.

130 Centre for Science and Environment (n 55) 35.

131 Civil Appeal No(s). 9202-9203/2022.

132 Abhimanyu Hazarika, 'Fine for environment law violation can't be based on company's revenue: Supreme Court slams NGT' (Bar and Bench, 30 November 2024) <https://www-barandbench-com.cdn.ampproject.org/v/s/www.barandbench.com/amp/story/news/litigation/fine-environment-law-violation-cant-based-company-revenue-supreme-court-slams-ngt?amp_gsa=1&amp_js_v=a9&usqp=mq331AQGsAEggAID#amp_tf=From%20%251%24s&aoh=17329851639108&csi=0&referrer=https%3A%2F%2Fwww.google.com&ampshare=https%3A%2F%2Fwww.barandbench.com%2Fnews%2Flitigation%2Ffine-environment-law-violation-cant-based-company-revenue-supreme-court-slams-ngt>

133 Centre for Science and Environment (n 55) 13.

deemed as a polluter. For instance, in *Vardhaman Kaushik v. Union of India & Ors.*,[134] the NGT, given rising air pollution in urban areas, had noted that the vehicles entering Delhi have been enjoying an 'undue incentive' of saving Rs. 1000, which is not reasonable and environmentally tolerable. Hence, it imposed an environmental compensation charge of Rs. 700 on two-axle vehicles, Rs. 500 on four-axle vehicles, and Rs. 1000 on three-axle vehicles entering Delhi, in addition to the toll tax.[135] In *Court on its own Motion v. State of HP & Ors.*,[136] NGT imposed a charge of Rs. 100 on heavy vehicles, Rs. 50 on light vehicles and Rs. 20 per person travelling by CNG or electric buses because of the air pollution caused by heavy tourism in Rohtang Pass.[137] Similarly, in *Sh. Permanand Klanta v. State of Himachal Pradesh*,[138] an environmental compensation of Rs. 500 was imposed on the vehicle moving around the Mall Road because of vehicular pollution in the form of air and noise.[139]

The NGT has also imposed spot fines and compensation on the polluters to utilize it to clean up the environment. In the case of *Manoj Mishra v. Union of India and Ors.*,[140] the NGT, considering the pollution of the Yamuna River, imposed the liability of paying Rs. 50,000 on anyone found dumping debris in the river. It forbade the throwing of pooja material or any other material in the river except at

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134 Original Application No. 21/2014, National Green Tribunal, 18th December 2017.
135 Centre for Science and Environment (n 55) 13.
136 2014 SCC Online NGT 1.
137 Ibid 53, 54.
138 OA No. 253 (THC)/2013, National Green Tribunal, 10 December 2015.
139 Centre for Science and Environment (n 55) 13.
140 OA no. 06 of 2012, National Green Tribunal.

the designated site and violation of that would attract the liability to pay Rs. 5,000.[141]

6.5 Direction to the State Authorities to invoke PPP:

Sometimes NGT directs the state authorities to devise a mechanism to impose costs upon the polluters by invoking PPP. For instance, in the case of *Kudrat Sandhu v. Govt. of NCT*,[142] the NGT held that an individual, not segregating waste, would be responsible for paying the penalty as per PPP. It directed the Municipal Corporation to frame a scheme by which people would be persuaded to give segregated waste through tax rebates and incentives, and submit it within a month of this order. It also asked the Corporation to penalize those individuals who do not segregate waste.[143] In another case of *Indian Council for Enviro-Legal Action v. National Ganga River Basin Authority and Ors.*,[144] the NGT, by applying PPP, directed the state authorities to design an appropriate policy mechanism to clean the Ganga river's Gomukh-to-Haridwar stretch in the state of Uttarakhand. The dumping of untreated sewage by the hotels, ashrams, and dharmshalas into the river polluted it, besides the lack of sewage treatment plants and necessary permits. The State Governments and the authorities were directed to invoke PPP and levy the environmental compensation and sewage charges proportional to the discharge of the effluents from the premises.[145]

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141 Centre for Science and Environment (n 55) 14.
142 OA No.281 of 2016, decided on 10th August 2017.
143 Centre for Science and Environment (n 55) 17.
144 OA No. 10 of 2015.
145 Centre for Science and Environment (n 55) 14.

In the case of *Court of its own motion v. State of Karnataka*,[146] the state failed to effectively implement the mechanisms to treat waste. Hence, the NGT directed the Central Pollution Control Board (CPCB) to formulate the scale of compensation to be recovered from the authorities or individuals. In another matter of *Paryavaran Suraksha Samiti & Anr. Vs. Union of India & Ors.*,[147] NGT directed CPCB to prepare an action plan on how to calculate and recover the environmental compensation. Accordingly, CPCB prepared a report in which it devised the following formula, which the NGT had accepted.

"EC = PI x N x R x S x LF, wherein

- *EC - Environmental Compensation in INR,*
- *PI - Pollution Index of the industrial sector,*
- *N - Number of days the violation took place,*
- *R - a factor in INR (₹) for compensation for the environmental harm caused by the industry,*
- *S - factor for scale of operation and*
- *LF - location factor."*[148]

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146 Original Application No. 125/2017 and M.A. No. 1337/2018, order dated 06.12.2018.

147 Original Application No. 593/2017 (In the Hon'ble Supreme Court, WP (CIVIL) No. 375/2012), orders dated 31.08.2018 & 28.08.2019.

148 Central Pollution Control Board, *Report of the CPCB In-house Committee on Methodology for Assessing Environmental Compensation and Action Plan to Utilize the Fund* (July 2019) <https://cpcb.nic.in/uploads/report-15.07.2019.pdf>

7. EXECUTION OF THE ORDERS OF THE NGT

Once the amount of environmental compensation is determined, the next questions arise as to whom the amount has to be paid and how this amount will be utilized. Section 24 of the NGT Act, 2010 provides the manner of depositing and utilizing the amount payable for environmental damage. It stipulates that the amount of compensation or relief has to be credited to the Environment Relief Fund (ERF). The Fund Manager manages the ERF and remits the amount from it.[149] ERF is regulated by the National Green Tribunal (Practices and Procedure) Rules, 2011. As per the notification of the Ministry of Environment, Forest and Climate Change, the Central Pollution Control Board has been appointed as the Fund Manager of ERF.[150]

Examination of various cases of NGT shows that the payment is not always directed to be made to ERF. Sometimes the money is directed to be paid to authorities like the State Pollution Control Boards, State Environment Departments, Forest Departments, and District Collectors. The data compiled by the Centre for Science and Environment shows that in the 40% of cases, the payment was directed to be made to the Pollution Control Boards; in 17% of cases to the State Environment and Forest Departments; and in 10% of cases to the District level authorities such as the Collector. In barely 12% of cases, payment was directed to be made to the ERF. In a few

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[149] The National Green Tribunal Act, 2010 (19 of 2010), s. 24.

[150] Ministry of Environment, Forest and Climate Change, Notification, 17 December 2024 <https://moef.gov.in/storage/tender/1735217021.pdf>

cases, NGT has ordered the payment to be made directly to the affected, and in one matter, to the Registrar of NGT itself.[151]

Rule 36 of the NGT (Practice and Procedure) Rules 2011 set down the procedure whereby the relevant authority has to transfer the amount, deposited for restitution of property, from the ERF to the concerned authorities (like the District Collector) to undertake the remedial and restitution work for the environment within 30 days from the receipt of the amount.[152] Rule 37 provides the procedure for disbursement of the amount by the above authority to the Nodal Agency, set up by the State Government, for the execution of projects or schemes for restoration and remediation of the environment within 180 days from the date of the order/award. The assistance of the State Pollution Control Board or any other expert can also be taken.[153] Some law practitioners said that sometimes the amount is paid straightaway to the authority that undertakes the remedial work for the environment, thereby bypassing the authority mentioned under the Public Liability Insurance Act. However, the directions of such direct transfer are outside the jurisdiction of the NGT and are also in violation of the NGT Act.[154] The Environment Relief Fund Scheme, 2008, recently amended by the Environment Relief Fund (Amendment) Scheme, 2024, also regulates the operation of this fund and provides the procedure for disbursing it.[155]

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151 Centre for Science and Environment (n 55) 18.
152 The National Green Tribunal (Practices and Procedure) Rules, 2011, Rule 36.
153 Ibid rule 37.
154 Centre for Science and Environment (n 55) 18, 19.
155 Environment Relief Fund Scheme 2008 (amended by 2024 Amendment), para. 3, 4, 5 & 7.

8. EVALUATING THE EFFECTIVENESS OF THE IMPLEMENTATION OF PPP

Despite having a catena of judgments/decisions on PPP and express laws, there are some gaps in its implementation, which have undermined its effectiveness. And environmental pollution is still on the rise.

In the report "Green Tribunal Green Approach,' it is observed, "*Effectively, polluters in most cases actually pay peanuts when compared with the scale of production and company turnover.*"[156] Thus, the lesser amount failed to create a deterrent effect, which defeats the objective of PPP and leads to minimal internalization of the pollution costs.[157] The burden of bearing the costs, then, shifts to the government, authorities, and people. For instance, in *Krishan Kant Singh v. National Ganga River Basin Authority and Ors.*,[158] the prosperity of the company, Simbhaoli Sugars, was taken into consideration to determine the penalty amount of Rs. 5 crores. The company's annual report of 2013-14 revealed a total turnover of Rs. 864 crores with sugar and alcohol units combined. The penalty amount of Rs. 5 crore was just 0.6 of the total turnover. Thus, the lack of proper methods for calculating compensation is one of the reasons for such inadequate determination.[159] In the case of *Ramdas Janardan Koli v. Ministry of Environment and Forests*,[160] where the port expansion activities of the companies were affecting the livelihood of

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156 Centre for Science and Environment (n 55) 12.
157 Ibid.
158 OA No.299/2013, Judgment dated October 2014.
159 Centre for Science and Environment (n 55) 12.
160 Application No. 19/2013 (WZ), National Green Tribunal, Dated 27th February 2015.

around 1,630 fishing families, the NGT imposed compensation of Rs. 95 crores on the companies, which was to be equally divided among the families. Subsequent analysis disclosed that the amount of compensation imposed was lower than the amount of minimum wage guaranteed under the Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) of 2005. The compensation of around Rs. 95 crores, when distributed among the affected families, converted into an estimated wage of Rs. 133 per day, which was less than the minimum wage stipulated under MGNREGA for the state of Maharashtra, which was Rs. 192 per day.[161] However, recently the Supreme Court has taken a contrary view in the case of *Benzo Chem Industries Private Limited v. Arvind Manohar Mahajan & Ors.*[162] wherein it was observed that a company's revenue would have no nexus with the amount of environmental damages to be imposed.

The polluters are sometimes found to be reluctant to pay under PPP and are found to circumvent the decisions of the Court. The final judgment of the Supreme Court in the landmark case of the *Indian Council for Enviro-Legal Action v. Union of India*[163] was avoided for about 11 years, even after the review and curative petition against it were dismissed. Even after 15 years of judgment, the litigation was kept alive by one or other interlocutory applications to circumvent compliance with the judgment. Thus, the polluter abused the process of law by delaying the payment of remedial environmental costs. Hence, the Supreme Court, in the case of *Indian Council for Enviro-Legal Action v.*

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161 Centre for Science and Environment (n 55) 16.
162 Civil Appeal No(s). 9202-9203/2022.
163 (1996) 3 SCC 212.

Union of India,[164] applied PPP dismissed the interim applications with the cost of Rs 10 lakh and imposed the compound interest @ 12% per annum on the due remedial amount of Rs 37.385 crores for 15 years' delay.

The orders of the NGT, charging higher amounts from the authorities, are usually opposed and challenged before the Supreme Court. In such cases, it is seen that the Supreme Court either orders the polluter to pay the penalty as ordered by NGT or it may stay that order. For instance, in the case of *Gurpreet Singh Bagga v. MoEF&CC*,[165] the NGT ordered each miner in the Saharanpur district of Uttar Pradesh to pay Rs. 50 crores and the stone crushers to pay Rs. 2.5 crores for violating the requirements of environmental clearance. This order was challenged before the Supreme Court which had put a stay on the execution of the NGT's order.[166] Likewise, in the case of *Centre for Environment Protection, Research and Development v. State of M.P. & Ors.*,[167] the execution of the order of the NGT was stayed by the Supreme Court. The obedience of NGT's orders is seen in those cases where the payment ordered to be made is not too high, especially if those payments are very low in amount, compared with the turnover of the companies. Generally, the industry does not show much resistance when the payment is directed to be made to the affected communities.[168]

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164 (2011) 8 SCC 161.
165 2016 SCC Online NGT 92.
166 Centre for Science and Environment (n 55) 41.
167 OA No. 1 of 2013 [CZ], National Green Tribunal, Dated August 3, 2015.
168 Centre for Science and Environment (n 55) 19.

There is no system to surveil and monitor the implementation of the orders and to ensure transparency of the proper payment and utilization of the amount. There is an ineffective implementation of the fines introduced by the administration or ordered by the Court/Tribunal. NGT, in its various orders, directed the states to introduce environmental charges/compensation. Consequently, the states have introduced environmental fines. However, the implementation of those schemes is poor.[169] In various cases, it has been found that the attitude of the administrative authorities is lackadaisical toward environmental matters, and fines are not imposed. In the case of *Permanand Klanta v. State of Himachal Pradesh*,[170] the order imposing an environmental compensation of Rs. 500 on vehicles entering heavy traffic areas in Shimla, like Mall Road, is yet to be implemented.[171] Likewise, in *Manoj Mishra v. Union of India*,[172] the Delhi Development Authority (DDA) was charged with the implementation of the NGT's order of levying environmental compensation of Rs. 50,000 for dumping debris and Rs. 5,000 for throwing waste like municipal solid wastes, pooja material, oil, etc. into the Yamuna river. At the outset, the fine was imposed, and the challans were issued. However, the Chief Engineer East Zone, DDA, communicated that DDA faced hurdles in proving the violations. Its authority to levy fines was challenged, and it was also accused of corruption. Thus, the implementation of the order was not effective.[173]

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169 Centre for Science and Environment (n 55) 20.
170 OA No. 253 (THC)/2013, National Green Tribunal, 10 December 2015.
171 Centre for Science and Environment (n 55) 20.
172 OA no. 06 of 2012, National Green Tribunal.
173 Centre for Science and Environment (n 55) 20.

The penalties are found to be stopgap measures, and in the long run, they are found to be ineffective in controlling pollution. There is also a need to devise policies that focus on long-term measures of preventing pollution rather than short-term remedial measures.[174] There is a need to raise environmental consciousness.

9. CONCLUSION

PPP is an instinctive principle that states that one who pollutes should remedy the same. It offers an effective solution to the widespread problem of pollution. It aims to persuade industries and individuals to take measures to prevent and control pollution and pay the cost/compensation in the event of pollution. In India, it is expressly incorporated in the leading case of Indian Council for Enviro-Legal Action v. Union of India (1996), which established that the polluter is absolutely liable to compensate the victims of pollution and pay costs to restore the environment. Later, the National Green Tribunal Act, 2010 has put a statutory mandate on applying PPP. However, this principle is not as easy as its nomenclature suggests. Many new issues and circumstances have come up before the Supreme Court and NGT, and to address them, they have given an expansive interpretation to PPP. NGT has been actively applying PPP and expanding its horizons to cover diverse situations of environmental degradation. PPP is not just applied to the actual pollution, but also in certain other cases in order to prevent the occurrence of actual pollution. It has been applied even against the State authorities. It

[174] Tandon (n 82) 41.

covers the preventive costs, compensatory costs, restitution and restoration costs, exemplary costs, and remedial steps to be taken in place of paying costs.

Calculating the cost payable under PPP with exactitude is another issue which the Court/NGT has addressed by formulating various methods to determine the cost. Sometimes, NGT is left with no option but to subjectively impose the costs based on guesswork. Although the route adopted by NGT helped it expeditiously impose the environmental costs on the polluter, this approach is somewhat against the principle of having a speaking order/well-reasoned judgment. Another method is to impose a certain percentage of the project cost or turnover. The assistance of experts is taken to estimate the quantum of environmental damage. At times, the preventive costs are levied, and the State authorities are asked to invoke PPP. Although the CPCB devised a formula for computing the environmental compensation, it is not a panacea for all matters.

The Environment Relief Fund is used to credit the amount charged by invoking PPP. However, the ground reality shows the lack of a uniform pattern for applying PPP. There is no mechanism to ascertain how the cost paid is utilized to restore the environment. There is no record maintained for it. It seems that the polluting industries and individuals prefer paying the fines or compensation rather than adopting environmentally friendly practices. The capitalist interests are found to be overpowering the need for sustainable development.

To make this principle more effective, NGT must avoid arbitrariness and undertake a proper assessment of the risk and damage with the help of experts. The adherence to the principles of natural justice is inevitable. An oversight mechanism is required to monitor its implementation and to ensure that the compensations and penalties are paid and utilized for the protection and restoration of the environment. The database of such information should be prepared to ensure transparency in the execution procedure of PPP. Efforts should be made to prohibit the occurrence of pollution at the very source. The strategic environment assessment is more proactive and, unlike the environmental impact assessment, takes place at the initial stage of the project decision-making process, focusing on sustainability and participation of all the stakeholders. Lastly, imposition of compensation/penalty under PPP is only a short-term measure. The long-term policy measures should be evolved, for example, educating and spreading awareness about the environment, subsidies and rebates for environmentally friendly technologies, green credit schemes, etc. PPP should not only be seen as the principle of penalizing the polluter and allocating the liability, but also as an inherent drive of every individual or industry to undertake activities, keeping in mind that the environment retains its vitality and is not polluted. It is a conscience, which has taken the shape of legal norms. This principle has a tremendous scope of expansion for emerging environmental concerns.

BALANCING RIGHT TO LIVELIHOOD AND CLIMATE JUSTICE: JUDICIAL RESPONSES TO SOCIO-ECONOMIC TENSIONS IN INDIA

*Mridul Yash Dwivedi**

Abstract

The present study examines the judicial debate between the norms of environmental protection and the socio-economic rights in India. It will focus on the approach adopted by the judiciary in balancing these competing notions. The paper has carried out case studies of two judgments passed in this regard by Hon'ble Supreme Court of India and has highlighted the challenges and the implications of the judicial interventions in the matters of environmental governance. In the first case, the court tried to balance the public health concerns against the right to livelihood of the workers connected with the firecracker industry. It showcased an approach which has given priority to the public health without imposing a ban on firecrackers. Contrastingly, in the other case, the court has underscored the measures which can be taken by the judiciary in cases where state machinery has been found to be negligent in the regulation of coal mining, thus it enforced the restoration of the environmental damage without addressing the issue of livelihood of the affected communities. An exploration into the judicial reasoning reflecting the principles of precautionary principle, polluter pays principle, inter-generational equity, etc., has

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been made and simultaneously has also exposed gaps in the addressing of the socio-economic vulnerabilities. Recommendations have been proposed later in this study to make environmental governance more inclusive which integrates the judicial mandates along with comprehensive policy measures. This approach will emphasize livelihood rehabilitation, participatory decision-making, and technological advancements. The paper argues for a transformative approach for achieving sustainable development by pointing out a synergy between environmental sustainability and socio-economic equity.

Keywords: Climate Justice, Livelihood Rehabilitation, Environment Justice Fund (EJF), Sustainable Development.

1. INTRODUCTION

The conjunction of environmental protection and socio-economic rights is a volatile issue in Indian Environmental Jurisprudence. Rapid industrialization and economic development are degrading the environment which intensifies this conflict between ecological sustainability and livelihoods. There is a necessity of judicial intervention in balancing these competitive interests. This is especially the case when the legislative and executive actions have been insufficient.

The constitutional framework of our country is such which gives importance to both environmental protection and socio-economic rights. Article 21, which is heavily interpreted by the

Supreme Court, includes the right to a clean environment. Simultaneously, Article 19(1)(g) gives protection to the freedom to practice any profession and on the other hand Articles 48A and 51A(g) duty bound the State and the citizens to protect the environment. This dual channel requires timely careful balancing and interpretation, especially in times where environmental policies threaten the livelihoods of the vulnerable communities. How the judiciary has played its role in this conflict is the center stage of this paper.

The paper will discuss two very key case studies on the point –

1. Arjun Gopal Vs. Union of India[1] and

2. State of Meghalaya Vs. All Dimasa Students Union[2] (Meghalaya Mining Case)

These cases show how the judiciary's approach has evolved over the period to balance these competing interests. These cases highlight how development can be achieved without compromising environmental health. The Supreme Court's interpretation of the constitutional provisions and the environmental principles demonstrate the commitment of the court for the protection of the interests of both the present and the future generations.

This paper is authored to critically analyze the judiciary's approach in the balancing of these interests. It will try to explore – whether the judicial intervention has equitably addressed these

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1 *Arjun Gopal Vs. Union of India* (2017) 1 SCC 412 (SC); [2016] SCC OnLine SC 1382

2 *State of Meghalaya Vs. All Dimasa Students Union* (2019) 8 SCC 177 (SC); [2019] SCC OnLine SC 822

tensions or inadvertently marginalized the vulnerable communities. Moreover, it will try to gauge the effectiveness of these judicial interventions in addressing the concerned environmental concerns and socio-economic impacts. By this, the paper will try to contribute to the ongoing discourse on the sustainable development and the judicial governance of environmental justice in India[3].

The study will offer insights into the adoption of effective judicial strategies for having congruence between environmental protection with livelihood concerns. It will try to recommend how to foster inclusive and sustainable development without disproportionate burdening of the economically vulnerable communities.

2. JUDICIAL APPROACH TO BALANCING LIVELIHOOD AND ENVIRONMENTAL PROTECTION

While dealing with the Environment jurisprudence, the Indian judiciary has constantly found itself at the intersection of the two yet often conflicting rights – the right to livelihood and the right to a clean and healthy environment and the right to protection of environment. This part of the paper will delve deeper into the reasonings, directives, and the implications of the two landmark judgments of Arjun Gopal and All Dimasa.

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3 Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19(3) *Journal of Environmental Law* 293

2.1 Arjun Gopal & Ors. Vs. Union of India & Ors. (2016 SC)

The Supreme Court of India was tasked in this case to address the alarming levels of the air pollution in the National Capital Region (NCR), which got exacerbated during the Diwali festival due to the extensive usage of fireworks. This was a public interest litigation (PIL) case which was filed by the concerned citizens which alleged the severe health hazards posed by deteriorating air quality. In this case, the court was called out for striking a delicate balance between the protection of public health and the safeguarding of livelihoods of thousands of dependents on the firecracker industry.

The court anchored its reasoning on the tenets of the constitutional principles, which are primarily flowing from the interpretations of Article 21 of the Constitution. At the same time, it also had to consider the application of Article 19(1)(g) which guarantees the freedom to practice any profession or carry on any trade or business. While trying to balance these issues, the court applied the precautionary principle and the principle of inter-generational equity. These two principals were advocating for the proactive measures in the face of environmental harm, especially in the situation where scientific certainty lacks.

The court, while acknowledging the cultural significance of the firecracker use during the Diwali festive season and the consequent economic dependency of the workers of this industry, refrained itself from imposing a complete and blanket ban. Instead, what it did was that it ordered a suspension of the licenses of the manufacturers and the sellers from selling certain high-polluting firecrackers. The court

ordered the Central Pollution Control Board (CPCB) to evaluate and regulate the chemical composition of the concerned firecrackers. By doing so, the court showed a nuanced approach by reflecting its restrained attitude and prioritizing public health over commercial interests.

The directives given by the Supreme Court had very far-reaching implications. On one hand, it significantly contributed to curbing the pollution levels during the festive seasons to safeguard public health and on the other hand, it disrupted the livelihoods of numerous small-scale manufacturers and workers in the fireworks industry. The court in this case overreached by putting its feet into the domain of environmental policy making. A policy making function is especially a domain of the legislature and executive and not of the judiciary itself. Hence, the court was criticized for being overactive in the name of doing justice.

A glaring gap in India's environmental law is the Apex court's uneven record of stepping in, a trend most obvious in how it handles pollution tied to festivals. In the Arjun Gopal case, the Supreme Court leaned forwardly and limited the firecracker use at Diwali, saying clean air[4] is part and parcel of the Article 21's right to life[5], yet the bench has stayed almost silent during other noisy occasions that also harm air and public health.

Take Ganesh Chaturthi for instance. Devotees drop Plaster-of-Paris idols, topped with harmful paints, into rivers and lakes,

4 *Subhash Kumar v State of Bihar* (1991) 1 SCC 598 (SC)
5 *Arjun Gopal* (n 1) [18]

pushing heavy metal levels up and chopping dissolved oxygen down.[6] Although the Central Pollution Control Board has repeatedly flagged the damage, and studies back it, courts mostly lean on the executive, hand down sweeping guidelines, yet almost never track compliance or punish wrongdoing, a stark contrast to the tighter framework set in Arjun Gopal.

New Year's Eve parties in big cities like Delhi and Mumbai still see people lighting firecrackers, holding bonfires, and crowding the streets, pushing PM2.5 and PM10 readings way up. For PM2.5, the average annual limit is 40 μg/m³, and its 24-hour average limit is 60 μg/m³. For PM10, the same is 60 μg/m³ and 100 μg/m³ respectively.[7] Yet the courts mostly look the other way, even when the air quality index slides into the severe zone on such nights.[8] In contrast, for Diwali, the Supreme Court set limits on cracker kinds and hours, banned online sales outright, and kept checking progress through state reports and affidavits.[9]

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6 Central Pollution Control Board, *Guidelines for Idol Immersion (2010)*; see also Times of India, 'Eco-friendly immersions: Pollutions board Guidelines only on paper' (09 September 2016) <https://timesofindia.indiatimes.com/city/nagpur/eco-friendly-immersions-pollution-board-guidelines-only-on-paper/articleshow/54200921.cms>

7 Central Pollution Control Board, *National Ambient Air Quality Standards (NAAQS) Notification, 18 November 2009*, Annexure 2: National Ambient Air Quality Standard (Ministry of Environment and Forests, New Delhi) https://cpcb.nic.in/upload/NAAQS_2019.pdf

8 SAFAR, *AQI Bulletin – Delhi* (1 January 2020); Indian Express, 'Delhi's Air Quality Remains Severe on New Year Eve' (December 31 2018) <https://indianexpress.com/article/cities/delhi/delhis-air-quality-remains-severe-on-new-year-eve-5517221/>

9 *Arjun Gopal* (n 1) [20]–[25]

The sharp difference in how courts step in shows a kind of pick-and-choose judging, pushing green rules hard in some cases yet ignoring them in others. These inconsistencies chip away at the public image of a fair judiciary and dent the courts credibility when they speak on environment issues. Because damage to nature crosses all beliefs and cultures, and any reliance on Article 21 should be steady and equal for everyone, or else it might turn into flashy, case-by-case activism instead of a clear, rights-driven policy.

2.2 State of Meghalaya Vs. All Dimasa Students Union (2019 SC)

In this case, the Supreme Court was again called out for addressing severe degradation of the environment due to rampant and illegal coal mining in Meghalaya. The petitioners alleged that such unscientific practice of coal mining in the region is leading to a large-scale destruction of ecology, which includes water contamination, and deforestation. This in turn affects the rights of the local communities and the ecosystems. The court, in this case, highlighted the failure of the State Government in regulating mining activities and ensuring that they are in compliance with the environmental and mining laws.

The court in this case held that the State is accountable for neglecting its statutory constitutional obligations. The court put its emphasis on Article 48A, as per which, the State bears a constitutional responsibility for protecting and improving the environment. Further, the court reinforces this duty by invoking the public trust doctrine which says that the state has the authority to hold natural resources in

trust for the public and future generations.[10] When the state fails to prevent the degradation of the environment, it violates this trust.

To remediate the damage done to the environment, the court validated the order of the National Green Tribunal (NGT) which directed the State government of Meghalaya to deposit Rs. 100 Crores with the CPCB for restoring the damage done to the local environment. More importantly, the court also clarified that the said amount has not been imposed as a penalty but a remedial measure which is designed to restore the ecological balance. This judgment highlighted the necessity for strict compliance with the mining regulations framed under the Mines and Minerals (Development and Regulation) Act of 1957 and the Mines Act of 1952, read with the Environment (Protection) Act of 1986.

The judgment of this case had a profound implication for the environmental governance and the government liability. It concretized the notion that the economic development can't remain unchecked and that it must align with the environmental protection laws. However, this ruling also stressed upon the socio-economic impact on the communities which were economically reliant on the mining of the coal. Hence, this judgment also underscored the need for the policies to address the alternative livelihoods and social welfare for displaced workers.

[10] (1997) 1 SCC 388

2.3 Comparative Analysis

If we do a comparison between the judicial approach in these two cases, we will find some significant insights into the judiciary's evolving approach in balancing these environmental concerns with the socio-economic rights. Regardless of the facts and circumstances and the differences in the stakeholders, both cases reflected the commitment of the judiciary towards environmental justice, underscored by the constitutional and statutory obligations.

In Arjun Gopal case**,** the court discussed the problem of acute air pollution crisis in Delhi NCR region, which was highly exacerbated by the use of firecrackers during the festival of Diwali. The court in this case balanced the cultural and economic rights of the firecracker industry against the public's right to clean air. The judicial intervention in this case was primarily focused on the private industry regulation through suspending licenses of the sellers and manufacturers of the firecracker components. The court also mandated the scientific assessments of the components used in these firecrackers. It emphasized on the taking of immediate action, which was necessary for protecting public health, even in the face of scientific uncertainty.

Contrastingly, the court in All Dimasa Students Union case dealt with the problem of inactivity of the state machinery in curbing illegal coal mining, leading to severe environmental degradation. The court said that the State Government is liable for not protecting the environment by taking appropriate measures. It ordered the government to deposit Rs. 100 crores for environmental restoration. This case highlights the readiness of the court in enforcing the

constitutional duties of the state government by invoking the public trust doctrine which underlines the state's responsibility for protecting the natural resources for future generations. This case, unlike the Arjun Gopal where private interests were directly regulated, reflected the oversight of the judiciary on the failure of the government in environmental governance.

The above two cases differ in the scale and the nature of the approach of the judiciary's intervention. In the first case, the court had a measured intervention, where it opted for the imposition of partial restrictions instead of having an outright ban on the firecrackers. This approach of the court demonstrates the sensitivity with which the court approaches the impugned matter related to livelihoods of the workers in the firecracker industry while prioritizing public health and environment protection. On the other hand, in the Meghalaya Mining case, the judicial stance was of a more punitive and corrective nature, which reflected a stricter but a hollow approach towards the neglect of the state government. Imposition of a significant financial burden on the state by the court provides strength to the shift towards holding governments financially accountable for alleged harm to the environment.

Both cases showcased the exemplification of environmental principles by the judiciary viz – the precautionary principle, polluter pays principle, and inter-generational equity. But, the application of these principles varied in scale and intensity. While the court leaned towards a preventive regulation in Arjun Gopal case, it laid its emphasis on the restorative justice in All Dimasa Students Union case,

which compelled the State to mitigate past damage to the environment. This contrasting difference showcases the varied nature of the approach of the court's adaptability in tailoring remedies as per the nature of the environmental harm and the entity responsible in the concerned cases.

A very important part of this comparison is the socio-economic impact of the above rulings. The restrictions, imposed in Arjun Gopal case, adversely affected the small-scale manufacturers and traders who were completely dependent on the firecracker industry. Although the Supreme Court's ruling in All Dimasa Students Union case was meant to rein in the environmental damage from uncontrolled rat-hole mining, it unexpectedly hit the many informal miners and casual workers who rely on coal for their daily bread. While the court acknowledged that the practice was illegal, it failed to sketch out a solid plan for helping those thrown out of work, leaving a painful hole in any proper system of transitional justice.

Though the Court recognized that state bodies must issue legit mining leases under the MMDR Act and allowed coal to move through monitored routes,[11] it did not order officials to draw up a clear plan for people who lose their livelihoods. That gap matters because thousands of workers, most from tribal and other marginalized groups, suddenly found themselves jobless with no basic safety net or re-training help.

Other countries show how a forward-looking approach can work. In Germany's Ruhr area, moving away from coal meant the state

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[11] *All Dimasa Students Union* (n 2) [190]–[194]

paid for retraining, safeguarded pensions for older miners, and helped those workers step into renewable jobs.[12] Likewise, when Kerala's Silent Valley hydropower project was shelved, displaced laborers found roles in eco-tourism, forest protection, and government-backed rural work, softening the blow.[13] Such cases prove that saving the planet and securing livelihoods don't fight one another. They succeed together when planned through strong, purpose-built institutions.

In the All Dimasa Students Union matter, a steadier path might have carried out district surveys to pin down exactly how many workers are affected and may have set up a transition support fund, drawing from the MEPRF or a fresh welfare account. They could have launched skill and re-skill courses in mine clean-up, ecosystem repair, and safe, rule-bound mineral transport; They would have helped people link to new jobs in eco-tourism, tree planting, or coal trading that the government watches. A system like this would tie in neatly with the protections found under Articles 21 and 41, giving people both a fair chance at a clean environment and the basic economic respect long denied to them by official welfare programs.

One more aspect can be differentiated by comparing these two decisions. There is a difference in the complex position of the judiciary between judicial activism and judicial restraint. On one hand, in the Arjun Gopal case, the court restrained itself by limiting its orders to

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[12] P Y Oei, H Brauers and P Herpich, 'Lessons from Germany's Hard Coal Mining Phase-Out: Policies and Transition from 1950 to 2018' (2019) 20 *Climate Policy* 963 <https://doi.org/10.1080/14693062.2019.1688636>

[13] Madhav Gadgil and Ramachandra Guha, *This Fissured Land: An Ecological History of India* (University of California Press 1992) 106–110

specific regulations and in a way respected the executive's role of policy making. But in the other case, the court assumed an active role when it directed the environmental restoration by stepping into the shoes of the executive where it failed. This difference in the role of the judiciary raises questions regarding the judiciary's role in policy domains which are reserved traditionally for the legislative and executive branches of the state.

In the Arjun Gopal case, the Supreme Court chose to be cautious by controlling the size, noise, and timing of firecrackers instead of banning them outright. The bench said, "We avoid blanket bans to minimize economic distress and social disruption", showing that it still respects the government's role in policymaking and prefers small, practical tweaks to sweeping commands. By contrast, in the All Dimasa Students Union case, the same Court jumped in much more forcefully when coal mining was at stake. It ordered the state to set up the Meghalaya Environment Protection and Restoration Fund, drew up a clean-up to-do list, and even laid down how public companies like Coal India Ltd. must sell and store their coal[14]. The judges explained that rampant, unmonitored rat-hole mining was wrecking the landscape and, because officials were doing nothing, it fell to the Court to make sure environmental laws were actually followed[15]. Together, these two cases show how the Court can switch between watchful restraint and hands-on activism depending on how bad the executive's failure is and how quickly the public interest needs saving.

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14 *All Dimasa Students Union* (n 2) [172, 190-194]

15 ibid [153]

Application of a dynamic judicial philosophy is revealed by studying these cases which balances the immediate public health needs with the long-term environmental sustainability. Still, they expose the limitations of the judiciary in addressing the broader socioeconomic ramifications that arise out of them. A comprehensive set of livelihood rehabilitation measures was missing in both these cases which points towards the need for a greater synergy between judicial directives and policy frameworks.

The broader implications of these rulings go beyond the immediate contexts of firecracker pollution and illegal coal mining. They set a legal standard for the courts in their approach towards similar kinds of disputes in the future. This reinforces the role of the judiciary as an enforcer of the environmental accountability principle. But, these judicial interventions must be complemented by such policies which ensure the unburdening of the vulnerable communities.

This analysis in a way illustrates the proactive and evolving role of the judiciary in environmental governance. While both judgments highlight the primacy of environmental protection, they also underscore the complex nature of the balance between the socio-economic rights and ecological sustainability. Moving ahead, it is imperative for the organs of the state to adopt such a collaborative approach which integrates the environmental imperatives with that of socio-economic equity, which ensures that environmental justice is not done at the expense of security of livelihood.

3. RECOMMENDATIONS

The Indian judicial landscape related to the balance between environmental protection and socio-economic rights has been dealt with above by discussing the two important judgments of the Supreme Court. They highlight the proactive stance of the judiciary in addressing the issue of environment degradation and safeguarding public health. However, these cases expose some critical gaps in the area of policy integration and socio-economic considerations, particularly regarding the livelihoods of vulnerable communities. Hence, it is imperative here to propose recommendations which not only reinforce environmental safeguards but will also ensure social and economic justice along with sustainable development. These recommendations will aim to bridge the gap between judicial mandates and their effective implementation on one hand and on the other hand, they will foster an inclusive framework which will harmonize environment protection with livelihood security.

Judicial orders for cleaning up the environment should not keep happening as one-off fixes, so we really need to build a steady system that teams judges, frontline agencies, and local people into the same plan. That urgency shot up after the All Dimasa Students Union case, when the court had to rescue a stalled executive machine and then laid out detailed steps for coal clean-up, restoration, and secure storage. Even so, courts, government departments, and the communities living with the damage, still lack a permanent meeting point to share results and monitor progress, and that gap in the structure keeps blocking real change.

An on-the-ground plan would set up Pilot Environmental Governance Councils (EGCs) in Meghalaya's most fragile and often disputed zones, kicking off in East Jaintia Hills, West Khasi Hills, and South Garo Hills, where mining activity is heaviest. Each council should be formally approved by the state through an official gazette notification under the Environment Protection Act of 1986 or the 2012 Meghalaya Mining Policy, and must bring together a retired High Court judge or member of the NGT, chosen by the courts, Pollution Control Board officers working at the district level, staff from the Directorate of Mining and Geology, councilors from the Autonomous District Councils set out in the Sixth Schedule of the Constitution of India, leaders from environmental NGOs as well as groups that promote tribal rights, voices from unions or worker cooperatives hit by mining impacts and one technical specialist named after talks with the CPCB or the MoEFCC.

The council's main duties should be to keep an eye on every court-ordered restoration task, and see how the MEPR Fund is spent, work as a bridge between State offices, central bodies like Coal India Ltd., and local tribal leaders, prepare and send clear, honest and evidence-based progress and rehabilitation reports to the High Court or Green Tribunal every six months and plan new, shared welfare schemes for displaced miners to make a living, doing so only after talking directly with the affected communities. The State of Meghalaya, working with the Ministry of Environment, Forest and Climate Change, should kick off a limited two-year pilot programme, then

check the results with the Katakey Committee[16] or whatever watchdog follows it. If that test works, the same approach could be rolled out in other hot-spots, including mining belts in Chhattisgarh, Odisha and Jharkhand.

Since the scheme relies on local people and agencies, not just court orders, it promises stronger rule-following and, just as important, a boost in democratic legitimacy, transparency and the flexibility to adjust rules as conditions change. There should be established dedicated environmental governance councils at the three levels of the governance, which should comprise the representatives from the government agencies, environmental experts, industry stakeholders, and affected communities.[17] Such councils would be playing the role of advisory and regulatory bodies to oversee the execution of environmental rulings, facilitation of adaptive policy frameworks, and mediation of conflicts between environmental regulations and livelihood concerns.

Additionally, the introduction of livelihood rehabilitation frameworks is very important for mitigating the adverse social and economic impacts of environmental regulations. Though crucial for the protection of the environment, the judicial directions often overlook the displacement of the marginalized communities and the connected economic hardship imposed on them due to their

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16 Independent Committee, *Fourth Interim Report* (2019) https://www.greentribunal.gov.in/sites/default/files/all_documents/FOURTH%20INTERIM%20REPORT%20IN%20OA%20NO.%20110%20of%202012.pdf

17 J Paavola, 'Multi-Level Environmental Governance: Exploring the Economic Explanations' (2016) *Environmental Policy and Governance* 26(1) 1-15

dependency on environmentally sensitive industries. To address this gap, governments shall develop a structured rehab program that will provide alternate livelihood opportunities, skill development initiatives, and measures for the social security of the affected workers. For instance, in the Arjun Gopal case, the government could have initiated a green transition program for shifting the workers towards more environmentally sustainable industries, such as renewable energy manufacturing or the eco-friendly artisan crafts.[18] Similarly, in the All Dimasa Students Union case, alternative employment schemes related to sustainable agriculture, eco-tourism, forest conservation, etc., could be developed to ensure social and economic resilience.

Establishment of an Environmental Justice Fund (EJF) can also be recommended. This fund will be specially designed to support the communities affected by the judicial environmental interventions. These funds shall be financed by charging environmental levies, imposing corporate social responsibility (CSR) and its contributions, and fines imposed for such environmental violations. The EJF should function as financial safety funds, which should provide compensation, livelihood support during devastating transition, and infrastructure development for impacted regions. EJF should be managed transparently by independent bodies with the representation from the concerned communities. Such funds shall empower the affected populations by directly addressing their socio-economic

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[18] International Labour Organization, *Green Jobs and Just Transition Policy Readiness Assessment in India* (ILO Policy Brief, February 2024) https://www.ilo.org/resource/brief/green-jobs-and-just-transition-policy-readiness-assessment-india-0

needs, ensuring the non-translation of environmental justice into socio-economic injustice.

Another recommendation is the strengthening of the environmental regulatory framework for ensuring the effective and smooth enforcement of laws and judicial & quasi-judicial pronouncements. This will lead to a comprehensive overhaul of environmental governance mechanisms, which will emphasize accountability, transparency, and community participation. Empowering the institutions like Central Pollution Control Board (CPCB), State Pollution Control Boards (SPCBs), the National Green Tribunal (NGT) with sufficient financial resources, technical expertise, and regulatory autonomy in decision making is very important. Furthermore, the Environment Impact Assessments (EIAs) should be carried out more rigorously and shall be of more participatory nature, which should incorporate social impact assessments (SIAs)[19] too so that a holistic evaluation of the consequences of industrial activities on the marginalized communities and eco-systems can be done. Such reforms will be of big help in enhancing the credibility and effectiveness of environmental governance and fostering greater public trust and compliance.

Talking about the judiciary, proper attention shall be given to the judicial training and capacity building programs for the judges. Judges, especially those who preside over environmental cases, shall be

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[19] Susan A Joyce and Magnus MacFarlane, *Social Impact Assessment in the Mining Industry: Current Situation and Future Directions* (International Institute for Environment and Development (IIED) – Mining, Minerals and Sustainable Development 2001) 8–10.

equipped with interdisciplinary knowledge which shall comprise environmental science, economics, and social justice. Establish dedicated judicial academies whose focus shall be on the environmental law and sustainable development which will ensure the recruitment of well-informed judicial officers regarding the complex tradeoffs taking place in environmental adjudication.[20] Regular workshops, international collaborations, and out visits for making practices in global environmental jurisprudence best, will further enrich the understanding of the judiciary and enhance the decision-making process, which will lead to pronouncement of more balanced and context sensitive rulings.

Recommendations will be incomplete if technological advances are not integrated in this whole process of balancing competing interests. Such integration of technology in environmental governance will pose another transformative opportunity in this regard. Technologies like satellite monitoring, Artificial Intelligence (AI), blockchain will revolutionize environmental compliance and enforcement. Satellite imaging and remote sensing can be a good medium to provide real time data on deforestation, mining, and industrial emissions, which will enable swift regulatory interventions. Different AI models can help in analyzing environmental trends and will also predict the potential ecological risks beforehand, to support a proactive decision making before any mishappening. Similarly,

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[20] United Nations Environment Programme, *Training Curriculum on Environmental Law for Judges and Magistrates in Africa: A Guide for Judicial Training Institutions* (21 April 2018) https://www.unep.org/resources/toolkits-manuals-and-guides/training-curriculum-environmental-law-judges-and-magistrates

blockchain can enhance transparency in environmental data management, which can ensure accountability in the utilization of funds and project execution. If these technologies are harnessed, environmental governance can become more efficient, transparent, and responsive.

While technology clearly reshapes how companies follow environmental rules, its real promise only shows up when people talk about specific day-to-day uses. Vague mention of satellites, AI or block-chain means little unless there are clear Indian examples that show regulators actually working with these systems.

Take the Odisha Space Application Centre (ORSAC) as an example. ORSAC and the Forest and Environment Department watch illegal mining using live satellite images and GIS maps.[21] That information feeds into the Ministry's Mining Surveillance System (MSS), built with ISRO, which automatically pings authorities whenever mining happens within 500 meters of a licensed site. In Delhi, the Indian Institute of Tropical Meteorology (IITM) runs AI models under the SAFAR project to forecast PM2.5 and PM10 levels up to three days early[22]. Court orders can rely on these predictions, allowing the Graded Response Action Plan (GRAP) to roll out step-by-step curbs before bad air actually arrives.

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21 Odisha Space Application Centre (ORSAC), 'Remote Sensing Applications for Forest and Environment Monitoring' <https://orsac.odisha.gov.in/>

22 SAFAR, 'System of Air Quality and Weather Forecasting and Research – Forecasting Model Overview' (*IITM*, 2024) <https://safar.tropmet.res.in/>

Around the world, Sweden and Chile are already testing block-chain to log emissions and check carbon credits, giving officials a secure, tamper-proof way to prove compliance no matter where the data travels.[23] India could adopt similar far-flung chains to track MEPR fund transfers or keep watch on restoration orders handed down by courts, especially in the tangled coal belt of Meghalaya's hills.

These cases show that technology should not be treated as some far-off concept, but instead seen as an everyday must, already stitched into credible, data-driven environmental justice. Courts such as the NGT and the Supreme Court can lock the idea in place by making digital reports, live compliance dashboards and links to local pollution boards mandatory.

Participation of the public and the community empowerment shall be central to environmental governance reforms. Judicial decisions often impact local communities to a great extent, yet these communities rarely get involved in the decision-making process related to environmental issues. Hence, legal frameworks shall institutionalize public consultations, participatory environmental assessments, and community monitoring mechanisms. Empowering the role of local bodies like Panchayati Raj and Municipalities in environmental management and decision making (Article 243G & Article 243W of the Indian Constitution) will decentralize this decision-making process and will lead to alignment of policies with the grassroots realities. Legal

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[23] Gemma Torras Vives, 'Why Data Infrastructure Is Key for a Transparent Carbon Market' (*World Bank Blogs*, 7 March 2023) <https://blogs.worldbank.org/en/climatechange/why-data-infrastructure-key-transparent-carbon-market>

aid clinics and awareness camps can also result in the empowerment of marginalized communities to assert their environmental rights and active participation in governance processes.

Rejuvenating public private partnerships (PPPs) in environmental restoration and sustainable development projects will somewhat bridge the gaps in resource management and will encourage innovations. Participation from the private sector, driven by a clear set of regulatory guidelines and liability frameworks should mobilize capital, technology, and expertise for large-scale environmental initiatives. PPP models can be employed for reforestation, waste management, renewable energy deployment, and ecological restoration projects that will ensure the meeting up of environmental goals without undermining any kind of economic growth.[24]

Education and setting up of awareness campaigns regarding the environment constitute another pillar for sustainable governance. Mainstreaming environmental studies in education sector at all levels and the launch of nationwide awareness campaigns can cultivate a culture of responsibility towards the environment among the citizens. These initiatives will emphasize on the interconnectedness of the environmental sustainability and socio-economic wellbeing, which will foster a collective commitment to sustainable practices. Promotion of eco-friendly livelihoods, waste reduction, and conservation efforts by community-based programs can further enhance the consciousness regarding the environment in our daily lives.

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[24] World Bank Group, *Public-Private Partnerships: Reference Guide Version 3* (2017) https://hdl.handle.net/10986/29052

Fostering national and international cooperation on the point of environmental governance will offer some valuable insights and resources. India's collaboration with the global institutions and neighboring countries, for the adoption of best global practices for the balancing of environment protection and socio-economic development, will surely give results. Creation of a cross border legal framework for the management of the environment, facilitating joint research initiatives, and knowledge sharing platforms will enhance India's capacity for addressing complex ecological challenges for the promotion of inclusive growth.

By laying down the above recommendation, the paper attempts to strike a sustainable balance between environmental protection and socio-economic rights by having a multifaceted and collaborative approach. The Judiciary has done a great job by pronouncing some of the landmark judgments in this regard, but some lasting solutions shall be found out which should transcend courtroom mandates. Integration of judicial directions with cohesive policy frameworks, robust institutional mechanisms, innovative technologies, engaging marginalized communities inclusively are essential for having sustainable and equitable development. Adoption of these recommendations can result in India's way for a better future where environmental justice and socio-economic wellbeing of the people can become mutually reinforcing pillars of the society's progress.

4. CONCLUSION

Maintaining a balance between environment protection and right to livelihood is a challenge within India's legal and policy framework. The discussed Supreme Court judgments in this paper highlight the judiciary's commitment for enforcing environmental safeguards to protect socio-economic rights. In the Arjun Gopal case, the court provided a priority treatment to the public health notions by restricting the sale and the usage of firecrackers and put a great emphasis on the precautionary principle and inter-generational equity. But this negatively impacted the livelihoods of those in the firework industry which reflects the limitations in the judicial reasoning without incorporating proper socio-economic safeguards. Similarly, in Meghalaya Mining Case, the court held the state government accountable for failure in the regulation of illegal coal mining and therefore, it mandated the financial restitution for the restoration of environmental damage. This decision, on one hand advanced the environmental accountability of the State, but on the other hand neglected to address the displacement of the mining communities of the concerned region of Meghalaya, which again in turn exposed a gap in the livelihood protection.

Such important verdicts show how the role of judiciary is transforming with regard to environmental management but at the same time it illustrates the existing difficulty of balancing ecological concerns with the requirement of economic viability. Asylee population groups should receive assistance matching their socio-economic context, which in this case means the development of

systems to guide them through loss transitions, as well as establishing detailed plans for resettlement, rehabilitation, and reform. Judicial oversight, though necessary, should be conjoined with preemptive legislation and administrative action, which account for potential socio-economic outcomes and include plans of incorporation for emotionally and physically distressed population groups. It is necessary to build institutional frameworks and facilitate multi-sectoral cooperation to do this and ensure that the pursuit of social justice within environmental protection systems does not unduly interfere with living standards.

Looking ahead, India will need to implement an integrative governance approach that promotes environmental responsibility alongside socio-economic rights or tolerance. This includes fostering novel approaches like access to justice and environmental justice funds to initiate public private partnerships for transitioning industries in a sustainable manner and beginning to use technology compliant with environmental monitoring. Local communities and people who are likely to be affected by policies cast or have stakeholders in the policy initiatives can be educated on governance and environmental responsibility and resilience generation.

To recapitulate, the trajectory towards sustainable development is establishing a point where effective environmental conservation is compatible with economic welfare. The ideal administration of justice admittedly is a critical starting point, but in conjunction with legislation spelling out broad parameters, efficient executive control, and adequate participation of citizens. It is only

through integrated and comprehensive governance that India guarantees the constitutional mandate of sound environmental protection coupled with decent employment for its people, and this includes the needs of the present, and those of the future.

JUDICIAL REVIEW OF BIG PUBLIC PROJECTS: A PUBLIC CHOICE THEORY CASE REVIEW

Kanishk Srinivas[*]

Abstract

The Indian judiciary has been widely praised for its proactive role in environmental protection through substantive legal principles, procedural innovations, and stringent accountability mechanisms. However, this paper identifies a critical exception: judicial deference in cases involving "big public projects", large-scale, government-backed infrastructure initiatives with significant public expenditure. Despite evident procedural irregularities and public opposition, courts often adopt a lenient stance toward such projects, raising concerns about inconsistent environmental oversight. While the judiciary has occasionally resisted executive pressure, it faces backlash, citing judicial overreach, lack of technical expertise, and economic costs, has led to a more restrained approach. The paper deals with the current and continuing criticism of judicial review over big public projects in light of environmental concerns. It examines whether judicial review remains a viable mechanism for environmental protection in such cases, given the executive's dominance in project approvals. The paper argues that there is a positive case to be made for judicial review in big public projects for effective environmental protection. Reliance is

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placed on Dworkin's political inequality framework and public choice theory to bolster the legal argument.

Keywords: environmental protection, big public projects, judicial review, public choice theory, Dworkin.

1. INTRODUCTION

The Indian judiciary has been hailed for being at the forefront of environmental protection.[1] This has primarily been achieved through the formulation of substantive concepts like polluter pays principle, precautionary principle, intergenerational equity, sustainable development absolute liability, procedural innovations like the relaxed *locus standi* requirements of PILs, continuing *mandamus* and effective utilisation of information gathering mechanisms. It has also not shied away from holding executive, administrative and private bodies accountable for their environmentally harmful activities. In short, the Indian judiciary has been extremely active in environmental protection, resisting opposing forces while attempting to operate within constitutional limits for judicial intervention.

While the judiciary continues to be lauded for its contributions (and rightfully so), this paper focuses on a particular realm of environmental protection where the judiciary, surprisingly and worryingly, operates as a lesser version of itself. This is the realm of authorising "big public projects". The author defines "big public

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1 See *generally* Deepender Kumar, Judicial Activism and Environment: A Case Study of India (2005) 12(2) Journal of Peace Studies; Garima Prashad, Indian Judicial Activism on the Right to Environment: Adjudication and Locus Standi *SSRN* <*https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3391846*>

projects" as government-supported infrastructure projects involving substantial public expenditure. While there is no clear demarcation of what would constitute *substantial* public expenditure, this is based on common notions of a major government project. Under these notions, the construction of an airport or a dam would be a big public project. The author uses illustrative cases from various time periods to show the deferential standards adopted by the judiciary when such projects are involved despite glaring inconsistencies in their approval procedures and widespread public disapproval.

The judiciary has occasionally attempted to dispel these allegations by pushing back against big public projects. However, this has resulted in scathing criticism from the executive and its representatives over the standing and ability of judges to regulate these projects. The executive has been quick to rely on the non-democratic foundations of the judiciary, their limited technical expertise and substantial economic losses from stalling big public projects to denounce judicial intervention.[2] Such criticism raises broader questions about the desirability of judicial review to secure environmental protection. Is the judiciary the appropriate authority for the evaluation of big public projects when the other branches of government have already conveyed their approval? Is the judiciary well-equipped to

[2] CUTS International, Economic Impact of Select Decisions of the Supreme Court and National Green Tribunal of India <https://www.niti.gov.in/sites/default/files/2023-03/Economic%20Impact%20of%20Select%20Decisions%20of%20the%20Supreme%20Court%20and%20National%20Green%20Tribunal%20of%20India.pdf>

handle this responsibility? It is these questions that the author attempts to answer in this paper.

After providing illustrations of the judiciary's acquiescence to big public projects, the author argues that the judiciary is institutionally best placed and inclined to work towards environmental protection. The paper relies on the literature surrounding the nature of judicial review and public choice theory to advance the case for judicial review for effective environmental protection.

This paper consists of two parts. First, the author highlights the current criticisms surrounding the judicial review of big public projects. Some key big public projects that have witnessed judicial acquiescence are indicated along with the issues underlying them. The author provides an example of a big public project that was halted through judicial review – the Mopa Airport – and the subsequent backlash from the executive which resulted in the judiciary softening its stance. Second, the author argues that the judiciary is ideal for correcting public choice failures by the executive. It will be shown that in a democracy with irremediable inclinations as envisaged by Dworkin, the executive is prone to public choice failures and enabling the judiciary to review their actions can help overcome such failures.

2. CRITICISMS OF JUDICIAL REVIEW SURROUNDING BIG PROJECTS

Judicial review, in general, has been prone to criticism for intervening in legislative and executive actions while lacking the democratic backing or technical expertise of these branches of

government.[3] This is further amplified in big public projects when the executive exercises its authority and subject matter expertise to plan and execute essential and complicated infrastructure projects. The administrative and technical institutions that have been created to provide expert guidance are intended to be the final arbiters on the implementation of such projects.[4] Therefore, the judiciary is seen as intervening excessively and without authority when it invalidates or stalls such projects.

In the Indian context, the judiciary has been targeted for stalling key public projects on the grounds of environmental protection. One key example of this is seen in the Mopa Airport case.[5] The State of Goa had an existing airport at Dabolim. However, since it was a military airport, civilian flights were barred for a substantial part of the morning. This prompted the Goa government to explore the construction of a civilian airport at Mopa. As part of the proposed project, the government (as the project proponent) was required to undertake an Environmental Impact Assessment (EIA) mandated by the Ministry of Environments and Forests (MoEF) through its 2006 Notification.[6] The objective of the EIA was to provide complete

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3 Jeremy Waldron, The Core of the Case Against Judicial Review (2006) 115 Yale Law Journal pp. 1346-1406

4 T V Somanthan, The Administrative and Regulatory State in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (ed.), *Oxford Handbook of the Indian Constitution* (2016, OUP) Chapter 22; Robert B. Horwitz, Judicial Review of Regulatory Decisions: The Changing Criteria (1994) 109(1) Political Science Quarterly pp.133-169; Elizabeth Fisher, Pasky Pascual and Wendy Wagner, 'Rethinking Judicial Review of Expert Agencies' (2015) 93(7) Texas Law Review pp. 1681-1722

5 *Hanuman Laxman Aroskar v. UoI* (2019) 15 SCC 401 ["Mopa 1"]

6 The MoEF was renamed as the Ministry of Environment, Forests and Climate Change ["MoEFCC"] in 2014 to reflect an increased focus on India's climate

information about possible threats to the environment from the proposed project. This information would then be used to evolve mechanisms for minimising or remedying the harms. The EIA is a self-assessment procedure that relies on the good faith of the parties and any non-reporting of perceived environmental impact strikes at the root of its objective.

Despite this, the State of Goa made multiple glaring omissions in its EIA. The State of Goa did not disclose that the airport was intended to be constructed on an environmentally sensitive plateau that was close to multiple wetlands, water sources, water bodies, biospheres, mountains and forests.[7] The requirement of a public consultation with local communities was not fulfilled satisfactorily. The Environmental Advisory Committee (EAC), which provides technical and expert advice on environmental clearances to the MoEFCC, failed to highlight these errors in the EIA and recommended the granting of environmental clearances to the Mopa airport.

change obligations: See 'Ministry of Environment and Forests undergoes a nomenclature change; government serious to tackle climate change' *The Economic Times* (28 May 2014) <https://economictimes.indiatimes.com/news/economy/policy/ministry-of-environment-and-forests-undergoes-a-nomenclature-change-government-serious-to-tackle-climate-change/articleshow/35651292.cms?from=mdr>

7 Ritwick Dutta, 'The Many Absurdities of the Supreme Court Judgement on Goa's New Airport' *The Wire* (8 April 2020) <https://science.thewire.in/law/supreme-court-mopa-airport-moefcc-eac-environment-development-eia/>; Shyam Diwan and Armin Rosencranz, *Environmental Law and Policy in India: Cases, Material & Statutes* (3rd ed, Oxford University Press, 2022) pp. 694-764

This resulted in the *Hanuman Laxman Aroskar v UoI* ["Mopa 1"] case before the SC.[8] The SC articulated the principle of environmental rule of law as a method of environmental protection aimed at securing "intragenerational as well as intergenerational equity". The SC noted the consequences of improper compliance with the EIA process while criticising the EAC for failing to discharge its duties. It was made clear that the focus of the judiciary was on ensuring compliance with the rule of law and a failure to adhere to the environmental protection norms would result in the refusal of environmental clearances. It is important to note that the SC embodied the principle of judicial restraint in two ways. First, it did not enter into an assessment of the policy decision to construct a new airport at Mopa. It accepted the State of Goa's justification for the new airport at face value and did not subject it to a necessity analysis. Second, the SC, being cognisant of the costs involved in big public projects, did not outrightly strike down the project. Instead, it ordered the EAC to reconsider the "conditions for the grant of environmental clearance" in a timebound manner and return to the SC for the disposal of the matter.

The Mopa 1 decision resulted in the State of Goa remedying the flaws in the EIA procedure and approaching the SC a year later in *Hanuman Laxman Aroskar v UoI* (Mopa 2).[9] The EAC recommendations were accepted with the SC imposing some additional conditions for effective environmental protection. Despite

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8 Mopa 1 (n 5)

9 (2020) 12 SCC 1 ["Mopa 2"]

a challenge by the petitioners to the domain expertise of the EAC members, the SC refused to entertain these objections and permitted the construction of the Mopa airport.

Despite the glaring violation of environmental protection norms and the SC's display of judicial restraint, the Mopa 1 case was heavily criticised. Amitabh Kant, who was then the CEO of the NITI Aayog [the "think-tank" of the government], wrote an opinion piece criticising the judgment for representing judicial overreach. After concerns were raised over sitting bureaucrats criticising the functioning of the judiciary, the piece was discreetly removed from the websites of the newspaper.[10] Shortly after, the NITI Aayog funded a research project by the CUTS Society titled "Economic Impact of Select Decisions of the Supreme Court and National Green Tribunal of India".[11] One of the decisions analysed by this report was the Mopa case. The SC was criticised for having caused a 37-39% cost overrun and a 21-month delay in the completion of the airport. The actions of the judiciary were alleged to have caused substantial hardship to the State of Goa, the contractors and the expansion of tourism infrastructure. The report did not evaluate the blatant misrepresentation by the State of Goa in the EIA. Instead, its recommendations focused on introducing a human-centric vision [understood as an anthropocentric vision] towards the economy,

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10 Nitin Sethi, Can a serving bureaucrat criticise judgement of the Supreme Court? *Business Standard* (6th May 2019) <https://www.business-standard.com/article/economy-policy/can-a-serving-bureaucrat-criticise-judgement-of-the-supreme-court-119050100233_1.html>

11 Supra Note 3, CUTS International

environment and development as well as institutionalising cost-benefit assessment during decision-making. These recommendations fly in the face of existing literature on environmental protection, with the anthropocentric vision having been criticised for being unsustainable and a cost-benefit analysis favouring considerations of environmental concerns.

While the Mopa case symbolises a situation where the judiciary has pushed back against the failure to comply with environmental norms, this has not always been the case. There are multiple cases where the judiciary has adopted a deferential standard and accepted the executive's requests for environmental approval in big public projects. Prominent among these are the Tehri Dam,[12] the Sardar Sarovar Dam,[13] the river interlinking project[14] and the Kudankulam nuclear power plant cases.[15]

The Tehri Dam has been at the centre of controversy and public protest since the time it was conceived. The dam, being built in the seismically active Himalayas, risked causing and being compromised by earthquakes in addition to inundating large areas of fertile land and displacing local communities. The large risks resulted in the EAC of the MoEFCC deciding against granting environmental clearance. Despite being shelved by its own EAC, the MoEFCC decided to proceed with the dam upon receiving funding from

12 Tehri Bandh Virodhi Sangharsh Samiti v State of UP (1992) Supp (1) SCC 44; N D Jayal v UoI (2004) 9 SCC 362

13 Narmada Bachao Andolan v UoI (2000) 10 SCC 664

14 In Re Networking of Rivers (2012) 4 SCC 718

15 G Sundaarrajan v UoI (2013) 6 SCC 620

Russia.[16] The expert opinions on proceeding with the dam were divided. To overcome opposing expert evidence, the executive continued to constitute new expert panels that would espouse their view. However, none of the multiple expert committees expressed their unanimous approval for the project. Despite these circumstances, the SC held that as long as the executive had applied its mind and obtained expert opinions, it could proceed with the project. The petitioners' request to conduct additional tests to assess the viability of the dam was rejected on the ground that the executive deemed them unnecessary. Merely a year after the SC approval, the region was hit by an earthquake causing tremendous loss of life and property. Expert analysis carried out after the earthquake indicated that the safety of the dam had been overestimated and it must not have been constructed to begin with.[17]

The Sardar Sarovar dam encountered similar conditions. The project was put on hold over environmental concerns but was executed after obtaining World Bank funding. In addition to ignoring the public outcry over the construction of the dam, the SC refused to deal with the fact that environmental clearance had been given without obtaining complete data. The SC proceeded to acquiesce to the executive's view solely on the ground that "construction of the dam had been undertaken and hundreds of crores had been invested".[18] The

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16 Shyam Diwan and Armin Rosencranz, *Environmental Law and Policy in India: Cases, Material & Statutes* (3rd ed, Oxford University Press, 2022) pp. 694-764

17 Shyam Diwan and Armin Rosencranz, *Environmental Law and Policy in India: Cases, Material & Statutes* (3rd ed, Oxford University Press, 2022) pp. 694-764

18 Narmada Bachao Andolan (n 12)

SC seems to have been motivated by the logic that it was acceptable for some sections of the population and the environment in certain parts of the country to be sacrificed for an unfounded understanding of development. The consequence of the SC's approval has been continuing litigation over the environmental concerns as well as rehabilitation of displaced communities as recently as 2018.

In short, whenever the judiciary has attempted to exercise its review powers over the environmental compliance of big public projects, it has been confronted with scathing criticism by the executive and its representatives. On the other hand, in cases where the judiciary has curtailed its review powers, big public projects continue to be the epicentre of serious environmental concerns. While this is not an empirical analysis, these illustrative cases seem to indicate that there is more to be gained from enabling and encouraging judicial review of big public projects to effectively address environmental concerns.

3. A CASE FOR JUDICIAL REVIEW IN ENVIRONMENTAL PROTECTION

This section aims to prove that the executive is ineffective in protecting environmental rights during big public rights while the judiciary is institutionally better placed and motivated to do the same. The author starts with Dworkin's argument that there is an absence of genuine political equality in a democracy since some groups are more likely to capture power over others. This results in irremediable inclinations in democracy in favour of stronger political groups. This is proven through the public choice theory/economic theory of

legislation which focuses on the costs and structures involved in government decision-making. Once it is shown that democracy privileges some groups over others, effectively protecting their rights more than other groups, the author will rely on Fallon's argument that judicial review is useful for guarding against the underenforcement of rights. This is sought to be proven through analysing the literature on institutional constraints on the judiciary and evaluating the incentives of the judiciary to act as guardians of the rights of weaker democratic groups.

3.1. Dworkin and Public Choice Theory

Dworkin notes that there is an absence of genuine political equality in a democracy with some groups more likely to be disenfranchised and deprived of their rights than others. This is seen as an irremediable characteristic of democracy that Dworkin advocates countering with judicial protection.[19] The logic is that if the legislature/executive is unwilling or unable to protect the rights of vulnerable groups, the judiciary must be tasked with enforcing these rights. He argues that these groups will gain the most from a transfer of such powers to the judiciary. In the case of big public projects, this means that the executive is inherently loaded against the interests of vulnerable groups [defined broadly to include local communities, minorities, and environmental groups] and there is a need for the judiciary to protect their rights and interests.

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[19] Ronald Dworkin, Political Judges and the Rule of Law in *A Matter of Principle* (Harvard University Press, 1985)

While there is significant strength in Dworkin's argument, he does not provide any conceptual or empirical backing for why the legislature/executive acts in this manner. Until it is shown that there are structural reasons for the government to behave in a biased manner, Dworkin's argument remains a political provocation that favours judicial review. It is to remedy this gap that the author uses the public choice theory to show the existence of Dworkin's irremediable inclinations of democracy.

The public choice theory, as Macey argues, moves away from the "naïve conception" of the legislature/executive working selflessly for public welfare.[20] Instead, it applies the acknowledged microeconomics principles of a rational individual working for his self-interest to the working of the government. It acknowledges that, just as in their private lives, individuals will work for their best interests while in government.[21] The public choice theory sees legislation/executive actions as a good that is demanded and supplied in the market.[22] Every action of the government is motivated by the self-interest of its members. So, it becomes important to analyse the costs and incentives involved in decision-making to evaluate the existence of Dworkin's irremediable inclinations.

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20 Jonathan Macey, Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory (1988) 74(2) Virginia Law Review pp. 471-518

21 Richard A. Epstein, 'The Independence of Judges: The Uses and Limitations of Public Choice Theory' (1990) 1990(3) Brigham Young University Law Review pp. 827-856

22 Macey (n 16)

While the paper uses the application of the public choice theory to the legislature and the executive interchangeably, a large part of the literature focuses solely on the legislature. Therefore, it becomes crucial to analyse whether the public choice theory equally applies to the legislature and the executive. Like the legislature, there can be a reasonable presumption that the members of the executive work for their self-interest. The absence of significant public constraints on the executive (unlike the legislature which routinely has to face direct public opinion during elections) makes it easier for them to favour interest groups with certain advantages as highlighted below. Moreover, the Indian model of separation of powers allows for a greater overlap between legislative and executive functioning.[23] Members of the executive are chosen from the legislature. The Constitution requires the members of the executive to mandatorily be a part of the legislature.[24] When the public choice theory has been held to apply to the legislature, it would equally apply to an executive that is constituted from the legislature.

The costs of decision-making are substantially reduced when there is effective coordination among homogenous groups. This premise, known as the interest group theory, argues that it is easier for smaller groups with closely aligned interests to gather information,

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[23] Justice (Retd.) Ruma Pal, Separation of Powers in in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (ed.), *Oxford Handbook of the Indian Constitution* (2016, OUP) Chapter 15; *Kalpana Mehta v. Union of India*, (2018) 7 SCC 1 (para 416)

[24] Constitution of India, 1950: Articles 75(5) and 164(4)

coordinate their activities and achieve favourable legislation.[25] This is because they don't suffer from the many traditional problems of coordination like free-riders, information gaps and differing motivations. It has also been shown that when substantial costs are threatened to be imposed on such small homogenous groups, they have a greater stake in securing a favourable outcome. The stronger motivation for a favourable outcome combined with efficiencies in cooperation makes homogenous groups with "high per capita stakes" extremely forceful actors in the field of legislation/executive actions. On the contrary, heterogeneous groups with lower per capita stakes lack the motivation and the ability to influence government decisions to such a degree.

Applied to the field of environmental protection and big public projects, this means that private actors and government bodies have a greater influence on decision-making than the diffuse public. This can be illustrated in the context of big public projects with the corporates and the executive forming a homogenous group with high per capita stakes in the outcome of the implementation and the public forming a heterogeneous group. For the former group, there is homogeneity in their interests – achieving the implementation of the project. Being the proponents of the project, they are also better placed to have full

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[25] Roger G. Noll, Economic Perspectives on the Politics of Regulation, in *Handbook of Industrial Organization* (Vol.2 pp. 1253-1287, Richard Schmalensee & Robert D. Willig eds., 1989); Peter P. Swire, The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law, (1996) Yale Law and Policy Review; Daniel C. Etsy, Toward Optimal Environmental Governance (1999) 74(6) New York University Law Review pp. 1495-1574

information and remedy any gaps. The implementation is also a high-stakes matter for these parties since crucial aspects like the financials of the corporates and the interests of the executive (ranging from legitimate ones like political pressures and development concerns to illegitimate ones like kickbacks and political funding) are on the line. On the contrary, for the public, there is significant heterogeneity in interests. In every project, there are likely to be groups with differing interests like environmental protection groups, marginalised communities, displaced people, landowners etc. All these groups may oppose the project but have different kinds of issues with it as well as different acceptable solutions to those issues. This makes coordination difficult when compared to the well-aligned interests of the homogenous group. The public also lacks the requisite technical knowledge leading to the creation of the information gaps. This increases the difficulty of organising a targeted or principled opposition to big public projects. Moreover, environmental protection resembles a low per capita stakes issue with free riders being able to benefit from the actions of other conscious citizens and not all members of the society being uniformly interested in opposing the project. The problem is further compounded by the inability of the public to shift the costs back to the government by voting them out of power since votes are neither a reflection of the intensity of preferences nor symbolic of voters' opinions on various issues. It has also been possible for political parties to shift attention away from

environmental issues with the passage of time in a manner that does not impact their electoral prospects.[26]

In short, there are substantial costs and burdens placed on the diffuse public to gather information, coordinate their actions and influence government policy on public projects as compared to private actors like corporations and contractors. In this manner, the public choice theory and interest group theory aid in moving Dworkin's conception of irremediable inclinations in democracy from a mere political provocation to a structural and economic critique of democratic organisation.

The public choice theory-based proof of Dworkin's irremediable inclinations in democracy provides an impetus for Fallon's argument. Fallon argues that judicial review is crucial for preventing underenforcement of the rights of vulnerable groups. When it is seen that the public, particularly communities affected by big public projects, face significant difficulties in influencing government policy and their rights are likely to be adversely affected, it is useful for the judiciary to function as an additional veto or "hedge" against violation of rights.[27]

However, akin to Dworkin's proposition, Fallon's argument remains a statement which assumes that the judiciary will not be impacted by the same factors that impede the functioning of the legislature/executive. In the next part, the author will indicate how

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26 Noll (n 19); Swire (n 19)

27 Richard H. Fallon, The Core of an Uneasy Case for Judicial Review (2008) 121(7) Harvard Law Review

factors like information gaps, diffuse interests and per capita stakes that influence the executive do not impair the Indian judiciary's functioning.

3.2. Judicial Review as a Viable Alternative

It is plausible to argue that if the legislature/executive acts according to their self-interests in discharging their duties, then the judiciary too would be driven by self-interest. Akin to the other branches, the judiciary would be prone to the influence of interest groups and unable to guard against the violation of rights of the diffuse public and vulnerable groups. However, as Macey argues, there are institutional constraints that prevent the judiciary from being influenced like the legislature/executive.[28] Any actions in furtherance of self-interest will be motivated by the desire to gain rewards and avoid punishments. However, in the case of the judiciary, institutional safeguards ensure that there can be no targeting of rewards and punishments to influence the judges. The salaries and tenure of judges, particularly in India, are constitutionally fixed and cannot be altered for individual judges.[29] If the legislature/executive seeks to reward or punish a specific judge for their actions, it cannot do so without imposing the same treatment on the other judges. The inability to gain rewards or avoid punishment for their actions reduces judges' self-interest-based motivation to favour interest groups. Instead, as Macey argues, the self-interest of judges lies in acting for general public

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[28] Macey (n 18)

[29] Constitution of India, 1950 (Article 125)

welfare and preserving their legacy. In the Indian context, such observations have been made by Baxi about post-Emergency judges.[30]

In the following part, the author will show that the Indian judiciary has helped level the playing field and eliminated the application of the interest group theory through its substantive and procedural innovations. The aim is to show that the Indian judiciary has not been influenced like the executive and this makes judicial review an ideal tool for protecting the rights of groups that are impacted by big public projects.

3.2.1. Information gaps

Small homogenous groups have enjoyed a significant monopoly over information surrounding big public projects while the diffuse public lacks the institutional support and knowledge to acquire such information. The judiciary has aided in eliminating these information gaps through the creation of Expert Committees and Groups.[31] This facilitates democratisation of decision-making on big public projects since the diffuse public is no longer impeded by the absence of information about the true impact of these projects. It enables the public to contest the implementation of these projects on

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[30] Upendra Baxi, Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, (1985) 4(1) Third World Legal Studies < https://scholar.valpo.edu/twls/vol4/iss1/6> ; S. P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2003, OUP) pp; P. N. Bhagwati, Judicial Activism and Public Interest Litigation (1985) 23 Columbia Journal of Transnational Law

[31] For example, see Rural Litigation and Entitlement Kendra, Dehradun v. State of UP (1985) 2 SCC 431; T.N. Godavarman Thirumulpad v. Union of India, (2002) 10 SCC 606; F K Hussain v. UoI (1990) SCC OnLine Ker 63

technical grounds as well as engage other experts to provide a holistic overview of any project's implications.[32]

3.2.2. Diffuse interests

Another limitation faced by the diffuse public is their heterogeneous interests. Unlike the interest groups who have the sole aim of implementing big public projects, the public is driven by differing interests and concerns. This makes coordination difficult as argued above. However, the judiciary eliminates the need for alignment of interests among the diffuse public through its interpretation of the writ jurisdiction and procedural innovations like PILs. The SC as well as the HCs have consistently held that the writ jurisdiction under Articles 32 and 226 form a part of the basic structure of the Constitution and cannot be curtailed.[33] Any person who alleges a violation of fundamental rights is entitled to approach the constitutional courts. Simultaneously, the relaxed *locus standi* requirement under PILs has enabled public-spirited groups with diverse interests to intervene in big public projects. Instead of requiring the diffuse public to have aligned interests and voice a uniform opposition to big public projects, the judiciary has enabled differing interests to convey their concerns on a standalone basis.

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[32] See Tehri Bandh Virodhi Sangharsh Samiti v State of UP (1992) Supp (1) SCC 44; N D Jayal v UoI (2004) 9 SCC 362

[33] Gopal Subramanium, Writs and Remedies in Sujit Choudhry, Pratap Bhanu Mehta, Madhav Khosla (eds), *Oxford Handbook of the Indian Constitution* (2016, OUP); *Raja Ram Pal v Speaker, Lok Sabha* (2007) 3 SCC 184

4. CONCLUSION

This paper has analysed the role of judicial review in environmental protection, particularly focusing on big public projects in India. Through an examination of key cases and theoretical frameworks, it demonstrates that the judiciary is institutionally best placed to protect environmental rights, despite facing criticism for intervening in executive decisions.

The paper's analysis rests on two theoretical pillars. First, it employs Dworkin's conception of democracy's irremediable inclinations, which suggests that certain groups are systematically disadvantaged in democratic processes. This theoretical foundation is strengthened through public choice theory, which provides economic and structural explanations for why the executive tends to favour certain interest groups over diffuse public interests in environmental matters. The paper shows that small, homogeneous groups with high per capita stakes (such as corporations and government bodies) can more effectively influence decision-making compared to the heterogeneous public with diverse environmental concerns.

Second, the paper builds on Fallon's argument for judicial review as a safeguard against the underenforcement of rights. Through analysis of cases like the Mopa Airport, Tehri Dam, and Sardar Sarovar Dam, the paper demonstrates how judicial intervention—or its absence—significantly impacts environmental protection outcomes. The institutional constraints on the judiciary, including fixed salaries and tenure, make it less susceptible to interest group pressures compared to the executive branch.

Importantly, the paper highlights how the Indian judiciary has developed mechanisms to overcome the traditional barriers faced by diffuse public interests. Through procedural innovations like PILs, expert committees, and relaxed *locus standi* requirements, the courts have helped level the playing field between powerful interest groups and environmental concerns. These innovations address the key challenges identified by public choice theory: information gaps, coordination problems, and heterogeneous interests among the public.

While acknowledging the criticism of judicial intervention in big public projects, this paper concludes that judicial review serves as an essential institutional check on environmental decision-making. The judiciary's unique position—protected from interest group pressures while equipped with tools to amplify diffuse public interests—makes it an indispensable guardian of environmental rights in the context of big public projects.

PIERCING THE CORPORATE VEIL FOR ENVIRONMENTAL HARM: TOWARDS A STATUTORY ECO- LIABILITY REGIME IN INDIAN CORPORATE LAW

*Maanyaa Gupta**

Abstract

This research paper assesses the complex relationship between corporate limited liability and environmental protection in a progressively globalised world, focusing particularly on the doctrine of piercing the corporate veil to hold parent companies accountable for environmental violations committed by their subsidiaries in India. It argues that the standards for piercing the veil are very harsh thereby making it a complex task to hold the parent companies liable for the misuse of the resources. This study analyses whether and under what circumstances should the corporate veil be lifted in environmental issues by conducting a comparative study of Indian jurisprudence and other common law jurisdictions, especially the United Kingdom. The paper also brings to light the significant gaps in the current Indian legislation regarding parent company liability and advocates for a statutory framework. Recognising the environment as a key stakeholder in corporate governance, the research suggests creating a regime of "eco-liability" that can strike a balance between corporate interests and preservation of the environment, as companies are not

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only engines of profit but they also bear significant responsibilities towards the broader social welfare.

Keywords: Corporate Accountability, Corporate Veil, Environmental Liability, Indian Jurisprudence, Limited Liability, Parent Company Liability, Separate Legal Personality, Subsidiary Company.

1. INTRODUCTION

The concept of limited liability has been a double-edged sword, promoting economic growth while also allowing corporations to evade responsibility for environmental violations. The Crime in India Report published in August 2022 by the National Crime Records Bureau, indicates a rise in registered environment-related offenses compared to 2020.[1] These results highlight the pressing need for stricter regulatory frameworks and more efficient implementation of environmental provisions to curb such wrongdoings. As the pace of climate change is increasing around the world, there should be stricter environmental compliance for corporations as they are the largest revenue-generating structures. This forms the central focus of this paper.

When holding corporations accountable for environmental violations, the primary focus is typically on two key groups: the directors and the parent company when a subsidiary is responsible.[2]

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1 Niyati Prabhu, *Criminal Liability of Corporations in India: An Environmental Perspective*, GEO. PUB. POL'Y REV. (2022).

2 Tanmay Gupta & Prerna Sengupta, *Environmental Piercing of Corporate Veil: Assessing the Liability of Directors and Parent Companies*, CBFL BLOG (May 24, 2022), https://www.cbflnludelhi.in/post/environmental-piercing-of-corporate-veil-assessing-the-liability-of-directors-and-parent-companies.

India in its stage for industrialisation and its aspiration to compete with developed nations has welcomed many MNCs.[3] Many of these are headquartered in foreign jurisdictions and operate within the country through subsidiaries and such parent companies distance themselves from these entities to avoid liabilities under the guise of limited liability and are able to disregard sound environmental practices in pursuit of higher profits.[4] Thus, this paper aims to evaluate the effectiveness of the 'piercing the corporate veil doctrine' to assess the accountability of the parent company. In particular, this paper suggests that the standards for piercing the veil should be relaxed in cases of gross environmental violations, while also establishing a robust statutory regime to hold them answerable and thereby deter such behaviour.

2. THE DOCTRINE OF LIMITED LIABILITY AND THE CORPORATE VEIL

The most salient feature of a company, is its legal *Raison d'être*, the presumed limited liability achieved through the 'corporate veil' which protects the corporations from their subsidiaries' liabilities.[5] This doctrine defines a corporation as an independent legal entity which has its own 'corporate personality'.[6] This principle was solidified

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3 C.M. Abraham & Sushila Abraham, *The Bhopal Case and the Development of Environmental Law in India*, 40 INT'L & COMP. L.Q. 334 (1991).

4 Jennifer A. Schwartz, *Piercing the Corporate Veil of an Alien Parent for Jurisdictional Purposes: A Proposal for a Standard That Comports with Due Process*, 96 CAL. L. REV. 731 (2008).

5 John H. Matheson, *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091 (2009).

6 Vijay P. Singh, *The Doctrine of Reverse Piercing of Corporate Veil: Its Applicability in India*, 27 TRUSTS & TRUSTEES 108 (2021).

in the landmark case of *Salomon v Salomon & Co Ltd*[7]. These principles are even firmly entrenched under the Indian corporate law.[8] However, if these principles are abused for evading responsibility, the courts can pierce the veil using the 'principle of equity'.[9] This allows courts to hold the managers personally liable, reinforcing the principle that a corporation's acts are distinct from its members, except in cases where the veil is pierced to prevent misuse of this protection.

Historically, the doctrine of limited liability evolved as an economic tool meant to encourage investment and entrepreneurial risk-taking.[10] Courts treated the company as a separate legal person to ensure that individual shareholders were not deterred from investing merely because they could be personally sued for corporate debts. Over time, this principle has facilitated large-scale capital formation and enabled corporations to expand across borders in a way that an unlimited liability form could not have sustained.[11]

However, the same insulation that protects investors also creates opportunities for corporations to externalise costs, particularly social and environmental harms, onto the public.[12] These concerns highlight the practical and ethical limits of the doctrine, and they

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7 Salomon v. Salomon & Co. Ltd., [1897] A.C. 22 (H.L.).

8 Pracheta Rathore, *Piercing the Veil of Environmental Liability in India Comparative Analysis between India and USA*, 5 INT'L J.L. MGMT. & HUMAN. 1223 (2022).

9 SINGH, *supra* note 6, at 108.

10 Henry Hansmann and Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 *Yale Law Journal* 1879.

11 Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2010) 34 Cambridge Journal of Economics 837.

12 David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 *Emory Law Journal* 1305.

provide important context for understanding why an uncritical acceptance of limited liability warrants deeper scrutiny. It is in light of these limitations that the next section evaluates why the doctrine, while legitimate in its original economic purpose, requires reassessment when applied to environmental violations and parent–subsidiary structures.

3. CRITIQUING CORPORATE LIMITED LIABILITY

The idea of limited liability of corporations has been both acclaimed and criticised since its inception.[13] This debate remains highly prevalent even today. Some of the modern scholars advocate for expanding the doctrine to encourage economic development, while their opponents, concerned about its misuse, seek to limit or eliminate the doctrine entirely.[14] This paper argues that limited liability, despite being the most fundamental principle, forming the very edifice of a company, should not be considered absolute when it comes to ecological violences.

Furthermore, it is evident that with the rise of international commerce, it has become increasingly common for MNCs to set up Indian subsidiaries under foreign parent companies. This structure allows corporations to leverage tax, legal, and political gains while limiting their exposure to risk.[15] It is argued that the parent company having the right to enjoy the profits accrued by its subsidiaries in

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13 MATHESON, *supra* note 5, at 1100.

14 Geoffrey Tweedale & Laurie Flynn, *Piercing the Corporate Veil: Cape Industries and Multinational Corporate Liability for a Toxic Hazard, 1950—2004*, 8 ENTER. & SOC'Y 268 (2007).

15 RATHORE, *supra* note 8, at 1224.

another nation should also incur the corresponding liability for any misconduct occurring within its organisation. This position is supported by both judicial and academic reasoning. Courts have repeatedly recognised that multinational groups operate as integrated economic units, with parents exercising strategic and operational oversight over subsidiaries, as seen in *Renusagar Power Co.*[16] Indian environmental jurisprudence further embeds the polluter-pays principle, which asserts that entities deriving economic benefit from an activity must also bear the consequences of resulting harm, as articulated in *Vellore Citizens' Welfare Forum*.[17] Scholarly work similarly highlights that parent companies centralise decision-making and extract financial gains from subsidiaries, thereby justifying an extension of liability to the parent when environmentally harmful conduct occurs.[18] Therefore, this setup raises convoluted questions about when can these foreign companies be subjected to the jurisdiction of Indian courts, and to what extent can they be held liable?

4. THE ENVIRONMENT AS A SILENT STAKEHOLDER

A company has many stakeholders and they can be divided into primary ones, whose involvement is crucial for the company's existence (e.g., employees, investors), and secondary stakeholders, who influence the company without direct engagement (e.g., media, activist

16 State of UP v Renusagar Power Co (1988) 4 SCC 59.

17 Vellore Citizens' Welfare Forum v Union of India (1996) 5 SCC 647.

18 Surya Deva, 'Acting Extraterritorially Through Subsidiaries: Enhancing Accountability of Multinational Corporations' (2004) 42 Washburn Law Journal 547.

groups).[19] In the pursuit of maximising shareholder wealth, the stakeholders tend to suffer. The environment, despite being fundamental to all life and human enterprise, is paradoxically treated as a 'silent and structural' secondary stakeholder in corporate liability frameworks, as it doesn't participate directly in business activities but still has significant commercial and social influence.[20] This misalignment is particularly concerning given the current environmental crisis, where the very resource essential for all existence faces severe degradation, yet corporate accountability for environmental damage remains inadequately addressed.

As previously laid down, the ongoing interpretation of limited liability often impairs the environment's interests as a stakeholder. Research indicates that firms using poisonous components tend to remain small or revamp into various subsidiaries, reflecting their reliance on limited liability and an awareness of their environmental impact to mitigate potential damages.[21] Due to the fact that these subsidiaries typically operate in third-world nations with high levels of pollution, the externalisation of damage makes environmental issues worse in these nations.[22]

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19 Eoin Jackson, *The Case for Eco-Liability: Post Okpabi Justifications for the Imposition of Liability on Parent Companies for Damage Caused to the Environment by Their Subsidiaries*, 7 LSE L.R. 61 (2021).

20 *Id.* at 64.

21 Al H. Ringleb & Stephen N. Wiggins, *Liability and Large-Scale, Long-Term Hazards*, 98 J. POL. ECON. 574 (1990).

22 Sterlite Industries (India) Ltd v Tamil Nadu Pollution Control Board (2019) 19 SCC 725; Union Carbide Corporation v Union of India (1991) 4 SCC 584; In re Gas Leak at LG Polymers Chemical Plant (2020 SCC OnLine NGT 104).

At a deeper level, this imbalance also comes from the way the law treats corporations and the environment. Companies are granted artificial legal personality, which allows them to hold rights, own property, and participate in legal processes in their own name.[23] This personhood strengthens their position and enables them to use corporate structures to limit or shift responsibility. The environment, on the other hand, has no such legal personality.[24] It cannot assert its own interests or seek remedies for harm caused to it. Its protection therefore depends entirely on external actors, usually the state or affected communities, who may not always have the capacity to effectively challenge large corporations.[25] This difference further contributes to the environment being treated as a silent stakeholder, despite being the very foundation on which all corporate activity depends.

5. CHALLENGES IN HOLDING FOREIGN PARENT COMPANIES ACCOUNTABLE

Holding a foreign parent company liable can be a tedious job as access to justice for victims in local courts is frequently impeded by intimidation, corruption, and a lack of financial resources necessary to fund legal representation against well-resourced MNCs.[26] Therefore, holding the parent company liable faces two significant challenges.

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23 John Dewey, 'The Historic Background of Corporate Legal Personality' (1926) 35 Yale Law Journal 655.

24 Sierra Club v Morton 405 US 727 (1972).

25 Gwendolyn J Gordon, 'Environmental Personhood' (2018) 43 Columbia Journal of Environmental Law 1.

26 Richard Meeran, *Legal Accountability of Multinationals: The Current State of Play in the UK*, 19 INT'L UNION RIGHTS 18 (2012).

First, is the Forum Non- Convenience (FNC) test and second is the Doctrine of Piercing the Corporate Veil.[27] This paper has its scope limited to the latter.

Establishing the level of control, authority, and other elements can be challenging to hold the parent responsible for the actions of its subsidiaries. One real life case study is of the chemical leak in Bhopal, India, which was one of the biggest and most devastating industrial disasters of the 20th century.[28] The gas leak's impacts were disastrous for the environment and also lethal to humans. Until the early years of the 21st century, the soil and water contamination resulted in prolonged health problems.[29] This was one of those human rights cases where the victims were left without any way-out because the justice system failed to impute responsibility to the parent company. In this case, despite holding the parent company absolutely liable for the actions of its subsidiary in India, the judgment was compromised due to the ongoing politics in India at that time.[30] By acting as the *parens patriae* in this case, the state prioritised its interests and compromised on individual claims thereby losing on the chance to establish a regime that could prove helpful to hold the foreign parent company liable in future cases.

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27 *Id.* at 18.

28 ABRAHAM & ABRAHAM, *supra* note 6, at 334.

29 M.J. Peterson, *Bhopal Plant Disaster – Situation Summary*, in *International Dimensions of Ethics Education in Science and Engineering Case Study Series*, NYU LIBRARIES ARCHIVE (rev. Mar. 20, 2009), https://archive.nyu.edu/bitstream/2451/33620/2/Bhopal%20Plant%20Disaster-Situation%20Summary.pdf.

30 *Id.*

Since, the requirements for piercing the corporate veil are ambiguous, contradictory, and complex, the judges may have a great deal of discretion in establishing when and under what conditions veil piercing is appropriate.[31] Therefore the end result of the cases are unclear and unpredictable. This paper argues that because of the lack of clarity in laws, parent companies can avoid responsibility, leading to lawsuits getting stuck in procedural hurdles. Enacting precise laws could decrease the chances of this happening and set a strong precedent that discourages companies from acting irresponsibly, prompting them to be more careful in their actions.

Furthermore, there is a noticeable pattern of cases being resolved right before trial, indicating a preference among MNCs for settlements rather than prolonged trials that could establish set legal precedents.[32] While settlements benefit the interests of both parties and help avoid the uncertainties of trial, they are just monetary in nature and not that burdensome for these profitable organisations. But more importantly they also prevent the establishment of binding legal principles that could shape future litigation. This problem even persisted in India when Union Carbide Corporation, the parent company in the Bhopal Gas Tragedy, was ordered to pay a huge monetary compensation (albeit very low compared to the damage done), but no definitive rule regarding piercing the corporate veil was

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[31] Jonathan R. Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99 (2014).

[32] MEERAN, *supra* note 18, at 19.

established in the case as no criminal charges were pursued to hold the parent company liable.[33]

6. LEGAL FRAMEWORK FOR HOLDING PARENT COMPANIES LIABLE UNDER INDIAN LAW

In India, piercing the corporate veil occurs in specific circumstances, broadly categorised into two main scenarios: statutory provisions and judicial pronouncements. Environmental claims typically fall under the latter, where courts intervene based on the facts of each case.[34] The framework under Indian law is provided under the Companies Act, 2013[35] (hereinafter referred to as 'The Act'), that allows for imposing liabilities on companies, including parent entities, for environmental violations. Section 135[36] of the Act mandates Corporate Social Responsibility (CSR) for certain companies, requiring them to contribute towards environmental sustainability. This inclusion highlights the legislative intent to incorporate environmental stewardship within the core governance structure. Meanwhile, Section 2(87)[37] of the Act defines the relationship between parent and subsidiary companies based on the parent's control, forming the legal basis for addressing the liability.

For liability, Section 166[38] of the Act outlines the duties of directors, which can be invoked when directors fail to uphold

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33 GUPTA & SENGUPTA, *supra* note 2.
34 RATHORE, *supra* note 8, at 1226.
35 Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).
36 Companies Act, 2013, § 135, No. 18, Acts of Parliament, 2013 (India).
37 Companies Act, 2013, § 2(87), No. 18, Acts of Parliament, 2013 (India).
38 Companies Act, 2013, § 166, No. 18, Acts of Parliament, 2013 (India).

environmental standards for the community at large, leading to directorial accountability. Section 2(60)[39] of the Act defines "officer in default," which includes any director or key managerial personnel who is liable for non-conformity. If environmental damage is caused by a subsidiary, this provision can likely extend to the parent company's directors if they were directly or indirectly involved in the decision-making process that led to the infringement.

The Act allows the corporate veil to be pierced when the subsidiary company can be proved to be merely an instrument of the parent, or where fraud is involved, thereby holding the parent liable. This aligns with the principles laid out in landmark Indian cases like *LIC v. Escorts Ltd.*[40] In this judgment, the court ruled that liability can be imposed on a parent company if the subsidiary's existence is so inextricably connected to it that they effectively operate as a single economic entity. Meaning, the case is such that the brain and nervous system of the subsidiary is in the hands of the parent company.

Additionally, in *State of UP v Renusagar Power Co*[41], the Supreme Court lifted the corporate veil after determining that the subsidiary company was essentially operating as an extension of its parent company, without any independent existence. In this case, it was also emphasised by the court that the doctrine of lifting the corporate veil must adapt to changing circumstances and business realities. These decisions, together with the provisions outlined in the Act, suggest

39 Companies Act, 2013, § 2(60), No. 18, Acts of Parliament, 2013 (India).
40 LIC v. Escorts Ltd., (1986) 1 SCC. 264 (India).
41 State of U.P. v. Renusagar Power Co., (1988) 4 SCC. 59 (India).

a legal framework that could make parent companies accountable for their subsidiaries' conduct.

Apart from the Act, there are several environmental law statutes in India which contain provisions that enable piercing of corporate veil. For instance, Section 15- F(2) of the Environment (Protection) Act, 1986[42] provides that any person who was in charge of the company's affairs shall be deemed guilty, unless they can prove they had exercised due diligence to prevent such commission. This reverse burden of proof establishes a stricter standard, however it is argued that companies can tactfully evade such a provision in Indian courts due to weak enforcement mechanisms. Furthermore, Section 15- F(3)[43] extends liability to any director, manager, or any other officer who gave consent, or because of whose neglect an offence occurred. This provision lowers the bar by also taking into account mere negligence, instead of requiring proof of control. Similar provisions are there in other environmental statutes as well, such as Section 47 of the Water (Prevention and Control of Pollution) Act, 1974[44] , Section 57 of the Biological Diversity Act, 2002[45] and Section 40 of the Air (Prevention and Control of Pollution) Act, 1981[46].

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42 Environment (Protection) Act, 1986, § 15- F(2), No. 29, Acts of Parliament, 1986 (India).

43 Environment (Protection) Act, 1986, § 15- F(3), No. 29, Acts of Parliament, 1986 (India).

44 Water (Prevention and Control of Pollution) Act, 1974 § 47, No. 6, Acts of Parliament, 1974 (India).

45 Biological Diversity Act, 2002, § 57, No. 18, Acts of Parliament, 2003 (India).

46 Air (Prevention and Control of Pollution) Act, 1981, § 40, No. 14, Acts of Parliament, 1981 (India).

Despite several such provisions existing in Indian law, there is no clear legal framework that establishes a regime for holding a foreign parent company liable for environmental damage in India. While the provisions for piercing of corporate veil are laid down, there is little clarity on the specific conditions under which the doctrine can be applied for environmental damages. On the other hand, the environmental law provisions operate independently and offer direct avenues for liability, however, holding corporations accountable under these laws is challenging due to the principle of separate legal personality.

These hurdles are further compounded by systemic issues within the National Green Tribunal (hereinafter, NGT), which is the primary adjudicatory body for environmental matters.[47] The NGT faces significant constraints like limited resources, political interference, and enforcement limitations. Additionally, India's environmental statutes are in urgent need of reform themselves, as for instance, the maximum penalty for violations is capped at merely Rs. 1 lakh which is a negligible amount for large corporations.[48] And even though NGT has issued several landmark judgments, their enforcement remains inconsistent with many entities failing to comply

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47 Gayathri Gireesh, Pradnesh Kamat & Viraj Thakur, *Examining the Doctrine of Veil-Piercing vis-à-vis Environmental Parent Company Liability in India*, CEERA Blog (June 5, 2023), https://ceerapub.nls.ac.in/examining-the-doctrine-of-veil-piercing-vis-a-vis-environmental-parent-company-liability-in-india/.

48 *Id.*

with the tribunal's orders.[49] In light of these constraints, this paper argues that a stricter regime for holding parent companies liable through an eco-liability regime can be most effectively manifested through a structured veil- piercing mechanism. Given the current limitations of environmental statutes, such a mechanism offers the most viable path for operationalising the eco-liability framework envisioned herein.

7. COMMON LAW FOUNDATIONS AND DIVERGENCE

7.1 The Duty of Care Approach in the UK

Piercing the corporate veil has its origins from the common law principles and has further evolved through global jurisprudence.[50] To understand its application in India, it is imperative to also explore its legal applicability in other common law countries, specifically in the United Kingdom (UK).

While Indian and British legal systems are quite similar, the UK has developed a distinct approach where legal arguments have emerged asserting that liability for a parent company can arise from the parent company's duty of care.[51] Under this framework, parent companies may be held responsible for predictable damage resulting from its subsidiary's operations.

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49 Sukriti Verma & Jyotsna Singh, *Strengthening Corporate Liability for Environmental Damage in India: Policy and Legal Reforms for Sustainable Development*, 7 INDIAN J.L. & LEGAL RES. 1 (2024).

50 RATHORE, *supra* note 8, at 1227.

51 JACKSON, *supra* note 13, at 1227.

This approach was exemplified in the landmark case of *Chandler v Cape plc*.[52] Here, Cape plc, the parent company, was found to owe a duty of care to an employee of its UK subsidiary who suffered from asbestos exposure. The court ruled that Cape plc's duty of care did not necessitate the piercing of the corporate veil. Instead, the court took into consideration the parent company's superior knowledge of asbestos risks which made it liable for failing to provide safe working conditions necessary for the employees of its subsidiary company. This decision propounded a new pathway for holding parent companies accountable while preserving the principle of corporate separation.

Apart from that there have been other recent cases from the UK which have been regarded as significant developments to hold parent companies accountable for environmental violations. First is the case of *Vedanta Resources PLC v. Lungowe*[53] where the defendants were accused of toxic discharge from a mine, which severely impacted the health of over 1,500 Zambian villagers. An internal sustainability report was used to hold the parent company liable for the subsidiary's pollution. Here, the Court pierced the veil by upholding the common law principle of duty of care, even though there was no instance of fraud or effective day to day control by the parent over its subsidiary. However, what was taken into consideration was that the parent exercised supervision and tendered advice and therefore, was held to owe a duty of care.[54]

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52 Chandler v. Cape Plc., [2012] EWCA (Civ) 525 (Eng.).

53 Vedanta Resources Plc. v. Lungowe, [2019] UKSC 20 (Eng.).

54 *Id.*

A clearer understanding of these cases shows that the UK courts rely on a predictable damage standard. The focus is on whether the harm suffered was reasonably foreseeable to the parent company because of its superior knowledge, technical expertise, or its role in setting group level policies.[55] If the parent could anticipate the risk and had taken the role for overseeing, the courts consider the damage predictable and therefore actionable. This approach allows liability to arise without piercing the veil, and instead rests on the parent company's assumed responsibility for preventing the very harm that later materialised.

7.2 Limits of the UK Approach: Why Eco-Liability Is Needed

Although some argue that the Vedanta case expanded on the duty of care for parent companies, this perspective overlooks the fact that here the duty was affirmed when responsibility was transferred to the parent company, regardless of whether that aspect was environmental or not[56]. Therefore, the Court prioritised responsibility and control over the damaging sector rather than the nature of the damage itself, shifting the discussion from environmental pollution to conventional common law negligence principles, which lack the urgency needed to address the serious issue of climate change effectively. Moreover, this ruling despite yielding a favourable outcome, does not offer a clear-cut application of liability in cases

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[55] Dalia Palombo, 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals' (2019) 4 *Business and Human Rights Journal* 265.

[56] JACKSON, *supra* note 13, at 73.

where a subsidiary causes ecological harm without direct proof of the parent company's control[57]. In the light of this, it is argued that an eco-liability framework would allow for this broader accountability while preserving common law negligence principles. Moreover, the need for such a regime has become increasingly evident, particularly in light of the next judgment in discussion.

Building on this, in the highly celebrated judgment of *Okpabi v. Royal Dutch Shell*[58], the case addressed the environmental harm caused from oil spills by Royal Dutch Shell plc, a subsidiary of the UK-based company, to a Nigerian tribe. Even though this case heavily relies on the Vedanta ruling, it goes further to establish that proving "direct control" by a parent company over its foreign subsidiary is self-defeating. In the judgment, Lord Hamblen drew a clear distinction between control and de facto management, holding that the latter is essential for imposing a duty of care on the parent company.[59] Where defective policies by the parent and a demonstrable degree of supervision exist, that is sufficient to trigger the duty of care principle to pierce the veil and hold the parent liable. These cases, represent significant progress compared to Indian jurisprudence, where a finding of fraud or significant degree of control remains essential to impose liability.

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57 *Id.* at 74.

58 Okpabi v. Royal Dutch Shell Plc., [2021] UKSC 3 (Eng.).

59 *Id.*

7.3 Australia's Statutory Model

In comparison, recent amendments to Australia's environmental laws have significantly broadened liability for corporate directors and related entities. Under these changes, if directors are convicted of environmental offences, they can now be required to pay restitution equal to the profits gained from the violation[60]. Notably, the elimination of defence of due diligence marks a significant shift, as directors can no longer avoid liability by simply demonstrating that they took reasonable due diligence measures. This stricter regulatory approach promotes a greater corporate accountability. India could benefit from adopting such an approach, where a similar framework could enhance environmental governance by ensuring that directors face real consequences for environmental violations.

Having established that, when comparing Australia's approach with that of the UK, it's evident that the British courts have made significant progress through cases like Vedanta and Okpabi, where parent companies were held potentially liable for the actions of their subsidiaries. However, the UK's system still relies heavily on proving control or direct involvement by the parent company, which limits the scope of accountability. In contrast, Australia has chosen a more direct path by eliminating certain legal defences and focusing on profit

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[60] Peter Briggs, Tom Dougherty & Zhongwei Wang, *NSW Overhauls Environmental Legislation, Expanding Liability and Strengthening Enforcement Powers*, ENVIRONMENT. PLANNING AND COMMUNITIES NOTES (Apr. 5, 2024), https://www.hsfkramer.com/notes/environmentaustralia/2022-02/nsw-overhauls-environmental-legislation-expanding-liability-and-strengthening-enforcement-powers.

restitution, creating more effective deterrents against environmental misconduct.

8.NEED FOR A STRUCTURED FRAMEWORK FOR PIERCING THE CORPORATE VEIL IN INDIA

Environmental obligation for corporate directors in India exists within the legal scheme, yet faces compelling enforcement challenges. While Indian legislations establish director liability, its effectiveness is compromised by lenient due diligence defences that often shield directors from accountability. Unlike the United States and Canada, where environmental statutes impose strict liability regardless of intent, Indian laws predominantly require proof of fault[61]. Though the United Kingdom similarly adopts a fault-based approach, their more rigorous enforcement standards have produced meaningful precedents through cases like Okpabi and Vedanta. This contrasts sharply with India's weaker enforcement mechanisms, which have resulted in limited corporate accountability for environmental damages.

It is argued that India could benefit from a stricter and more profit-based restitution model like Australia's. This could push the foreign parent companies to discharge caution and to prioritise environmental conformity. Moreover, it is contended that the real duty should be to avoid causing environmental harm and to actively work to prevent it. However, the challenge presented by the Indian legal requirement to prove damage caused is a major issue because it means

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61 GUPTA & SENGUPTA, *supra* note 2.

that a company will only be deemed answerable once harm has been done, regardless of their negligent environmental attitudes.

Therefore, it is evident that there is an urgent need for statutory intervention for Indian courts to hold the parent companies liable for gross environmental violations. This eco- liability regime is suggested to be incorporated within the Companies Act, 2013, which already contains provisions for piercing of corporate veil. Given the multiplicity of environmental statutes in India, with varying principles and limited consistency, it is suggested that the eco-liability provisions be consolidated within the Companies Act itself. This would establish a uniform statutory regime in holding the parent companies directly liable for a failure of their duty of care principles if their subsidiaries are involved in gross environmental damages in India. Such an integration would also remove the ambiguity over which statute to invoke, be it the Water Act, Air Act or any other provisions, by providing a single comprehensive mechanism applicable to all types of environmental damages within the corporate context. Mandatory sustainability disclosures for such MNCs could also be established within this framework to monitor the actions of subsidiaries to prevent violations in the future. In severe cases, environmental liability regime, similar to that of Australia's strict restitution model can be established to serve as a deterrence mechanism for these companies to not engage in practices that could potentially lead to environmental harm.

Moreover, since there is wide discretion when applying veil-piercing standards, with courts often delivering conflicting judgments, this discretion could be curtailed by imposing criminal accountability

and eliminating provisions for settlement or purely civil liabilities. This would reduce the incidence out- of- court settlement and limit the ability of large corporations to exert pressure in exchange for mere pecuniary compensation. Establishing a clear standard and enforcement mechanism within eco- liability statutory framework could limit judicial discretion. Such an introduction would not only be beneficial for India but could also serve as a model for other developing nations grappling with similar environmental issues.

This need for reform is further supported by the recent Indian developments highlighted in the landmark case of *M.K. Ranjit Singh v. Union of India*[62], where the Supreme Court recognised the right to be protected from the negative impacts of climate change as a part of the fundamental rights to life and personal liberty. This recognition underscores the urgent necessity for an eco- liability regime in India, one with the potential to safeguard individuals from adverse effects of climate change and ensure the protection of their constitutional rights.

9. CONCLUSION

In conclusion, with the above analysis it is clear that, even though the principle of limited liability promotes economic development, it also poses significant problem in the realm of attributing environmental accountability. The major issue comes while deciding when and how to impose this liability. Although Indian courts have established precedents for piercing the corporate veil in environmental cases, this principle needs formal legislation. Moreover,

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[62] M.K. Ranjitsinh v. Union of India, 2024 SCC OnLine SC 570.

the current requirement of demonstrating damage implies that a corporation will only be held liable after harm has been caused. However, it is crucial to recognise that the duty should not only be to refrain from causing damage but also to actively prevent it.

Therefore, it is contended that an expansion of both the scope and extent of liability through a statutory regime is a need of the hour. Such a framework should be one that is clear, comprehensive, and uniformly applied. This could be achieved through the introduction of an "eco-liability" scheme, which would recognise the environment as a key stakeholder, ensuring that corporations cannot hide behind the corporate veil to evade responsibility. However, just introducing such a framework would not be enough, and will have to be combined with a strong public enforcement mechanism to establish a strong regulatory framework.

TRANSFORMING CLIMATE CHANGE DISCLOSURES REGIME: EVALUATING AND REFORMING INDIA'S BRSR FRAMEWORK FOR HOLISTIC SUSTAINABILITY

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Abstract

The sustainable development agenda has significantly influenced corporate actions globally, particularly in addressing climate-related issues. While traditional corporate legal policies emphasize financial reporting, contemporary legal developments focus on non-financial reporting. This shift encompasses disclosures on Environmental, Social, and Governance (ESG) issues, with climate change-related disclosures falling squarely within the ESG domain. Jurisdictions worldwide have mandated climate change-related disclosures, and in India, the Business Responsibility and Sustainability Reporting (BRSR) framework requires the top 1000 listed companies by market capitalization to provide such disclosures. However, India's climate change-related disclosure framework faces several challenges that undermine its effectiveness.

The research employs a doctrinal methodology, analyzing legislative provisions, judicial precedents, and academic literature related to the BRSR framework and its implementation in India. This paper

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outlines the contours of climate change-related disclosures and their issues and challenges. It begins by explaining the role of the climate change-related disclosure framework in maintaining ecological equilibrium and promoting corporate governance. Next, the paper explores the historical background and legal framework governing climate change-related disclosures under the BRSR. It then critically examines the BRSR framework, highlighting significant challenges within India's climate change-related disclosure regime. Among the most pressing are the ineffectual enforcement of directors' duties concerning environmental and climate issues under Section 166(2) of the Companies Act, 2013 and the lack of locus standi for derivative actions, and oppression and mismanagement remedies in climate-related litigation. Finally, the paper offers policy recommendations to enhance the climate change-related disclosure framework, aiming to make it comprehensive enough to address legitimate environmental concerns effectively.

Keywords: Climate Change, Environment Social and Governance (ESG), Business Responsibility and Sustainability Reporting (BRSR), Materiality, Investor, Companies Act.

1. INTRODUCTION

Climate change and global warming themes have reshaped global policymaking over the years. Mass industrialization since the 18th century has significantly contributed to climate change through the emission of greenhouse gases (GHGs), leading to a rise in global

temperatures.[1] Constant degradation of the planet has the potential to wipe out the entire human race, leading to extinction soon. There have been disastrous predictions concerning the melting of glaciers, and the food crisis[2], extreme weather conditions, and other climate change-related catastrophes[3]. Therefore, there is an imperative need to address these environmental challenges. Responding to the interdependence of ecosystems, international society has witnessed cooperation from various state and non-state actors at the global level and thus has expanded the horizons of *'green jurisprudence'*.[4]

In recent years, there has been a growing recognition of the need for businesses to adopt environmentally sustainable practices and be accountable for their environmental impacts.[5], leading to the integration of '*green jurisprudence*' into corporate policymaking. With the confluence of green jurisprudence in corporate policymaking, concepts like Corporate Environmental Responsibility (CER), Triple Bottom Line (TBL), and Environmental, Social, and Governance (ESG) emerged.[6] In contemporary times, numerous enterprises have

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1 'Climate Change' (*World Meteorological Organization*, 16 December 2022) <https://wmo.int/topics/climate-change>

2 Jan Bebbington and Carlos Larrinaga-González, 'Carbon Trading: Accounting and Reporting Issues' (2008) 17 European Accounting Review 697.

3 Roshaan Wasim, 'Corporate (Non) Disclosure of Climate Change Information' (2019) 119 Columbia Law Review 1311.

4 Elaine (Lan Yin) Hsiao, 'Pushing the Limits of Environmental Law: Climate Change and Transboundary Conservation' in Phillipa C McCormack and Richard Caddell (eds), *Research Handbook on Climate Change and Biodiversity Law* (Edward Elgar Publishing 2024) <https://www.elgaronline.com/view/book/9781800370296/book-part-9781800370296-11.xml>

5 ibid.

6 Niraj Gupta & Amar Chanchal, 'Mainstreaming ESG and Role of the Board' (2022) 5 Journal on Governance 1.

embraced environmentally conscious policies and practices on ESG factors that transcend conventional environmental regulatory requirements.

ESG factors in climate change-related disclosures transcend beyond traditional financial reporting. ESG provides a framework for stakeholders to understand how a corporation manages risks and opportunities related to environmental, social, and governance aspects.[7] ESG integration in corporate governance has extra-legal ramifications as well. After witnessing the transition from CSR to ESG, one could only assert that despite the ESG agenda being market-driven, securities and corporate regulators across the globe have begun to modulate ESG risks through legal and regulatory instruments.[8] Such legal and regulatory measures render *'non-financial reporting'* an obligation rather than voluntarism.

In India, the journey towards comprehensive climate change-related disclosure requirements has been marked by significant milestones. The introduction of the Business Responsibility and Sustainability Reporting (BRSR) framework represents a watershed moment in this evolution, mandating ESG disclosures for the top 1000 listed companies by market capitalization.[9] This development aligns

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7 Kyle Peterdy, 'ESG (Environmental, Social, & Governance)' (*ESG (Environmental, Social, & Governance)*) <https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/>

8 Umakanth Varottil, 'The Legal and Regulatory Impetus towards ESG in India: Developments and Challenges', *Research Handbook on Environmental, Social and Corporate Governance* (Edward Elgar Publishing 2024).

9 Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Gazette of India, (Sep. 2, 2015).

with global trends and reflects India's commitment to sustainable development and environmental protection.[10] However, the efficacy of the current climate change-related disclosure regime in India is subject to debate. While the BRSR framework represents a significant step forward, it faces several challenges that potentially undermine its effectiveness.[11]

As noted earlier, reporting climate change-related disclosures essentially falls under the domain of *'non-financial reporting'*. Unlike financial reporting, the principal challenge posed by the codification of '*non-financial reporting*' standards is the presence of non-quantifiable parameters. Codification of climate change-related disclosures too has its limitations.

In the global context, frameworks such as the Task Force on Climate-related Financial Disclosures (TCFD) and the Global Reporting Initiative (GRI) have become widely recognized standards for corporate disclosures on climate-related issues. TCFD focuses on incorporating climate risks and opportunities into the financial decision-making of a company, providing detailed guidelines for assessing and managing those risks.[12] Likewise, GRI establishes

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10 Sunitha Abhay Jain and Neetha Kurian, 'Climate Change, Risk Management, and ESG: An Indian Perspective' in Vinay Kandpal, Arun Kumar Tripathy and Nidhi S Bisht (eds), *Developments in Corporate Governance* (Springer Nature Singapore 2025) <https://link.springer.com/10.1007/978-981-96-6366-8_29>

11 Arjun Goswami Jain Avinash Das, Anmol, 'An Introduction of ESG Disclosures in Indian Regulatory Space - Part 2' (*India Corporate Law*, 6 December 2021) <https://corporate.cyrilamarchandblogs.com/2021/12/an-introduction-of-esg-disclosures-in-indian-regulatory-space-part-2/>

12 Michael R. Bloomberg, "Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosures" (Task Force on Climate-related Financial Disclosures, n.d.).

comprehensive reporting standards that facilitate transparency across all environmental, social, and governance domains.[13] These frameworks have inspired legislative and regulatory corporate policy-making across the globe and shaped the evolution of corporate ESG practices.

India's Business Responsibility and Sustainability Reporting (BRSR) framework draws from these global benchmarks, to align domestic corporate practices with international standards. However, the lack of concreteness in codifying climate change-related ESG compliance resurges board sensitization tactics, whose effectiveness is in the doldrums. Inter Alia, challenges under the BRSR framework range from enforcement issues to the lack of sector-specific disclosure requirements, raising questions about the regime's ability to drive meaningful corporate action on climate change.

While the BRSR framework has been widely discussed in ESG reporting, existing literature has not adequately addressed its enforcement challenges and the lack of sector-specific guidelines. For instance, studies have primarily focused on compliance rates and the framework's alignment with global standards. Still, there is limited research on how the absence of robust enforcement mechanisms and uniform disclosure requirements across sectors undermines its effectiveness. This paper seeks to fill this gap by critically evaluating these shortcomings and proposing targeted reforms, including board

[13] "GRI's Sustainability Reporting Standards (2021) for ESG Transparency." (Global Sustainability Standards Board (GSSB)., n.d.).

sensitization, sector-specific disclosure requirements, and enhanced verification mechanisms, to strengthen the BRSR framework.

2. ENVIRONMENTAL SUSTAINABILITY AND CORPORATE RESPONSIBILITY: THE ROLE OF CLIMATE CHANGE-RELATED DISCLOSURES IN ESG FRAMEWORK IN TRANSITIONING TOWARDS LOW CARBON ECONOMIES

In recent years, many governmental and international institutions have endeavoured to analyze risks associated with climate change and opportunities concerning transitioning toward low-carbon economies.[14] Therefore, assessing the implications on the global financial system becomes instrumental in this regard. A study conducted by the London School of Economics highlights that the global economy may potentially experience a colossal loss of $24 trillion due to climate change.[15]

Efficient transition of economic systems towards environmentally sustainable practices necessitates proficiency of financial markets to adeptly channel capital, and evaluate and mitigate eco-risks, thus abating the dangers of stranded assets and outdated production procedures that imperil the sanctity of the environment.[16] This would, in turn, enable the promotion of renewable energy

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[14] OECD, *The Economic Consequences of Climate Change* (OECD 2015) <https://www.oecd-ilibrary.org/environment/the-economic-consequences-of-climate-change_9789264235410-en>

[15] Damian Carrington, 'Climate Change Will Wipe $2.5tn off Global Financial Assets: Study' *The Guardian* (4 April 2016) <https://www.theguardian.com/environment/2016/apr/04/climate-change-will-blow-a-25tn-hole-in-global-financial-assets-study-warns>

[16] OECD (n 12).

sources, streamlined production processes, and ecologically-friendly technologies, while directing investments in the same, in a lucid and structured manner.[17] Concretely such transitioning can be done efficaciously through the ESG framework.

The issue of corporations' responsibility toward the environment has been studied in several empirical researches. A study conducted by the Carbon Major Database has revealed that the top 100 fuel-producing companies have a critical role in climate change, being accountable for a significant 71% of global greenhouse gas (GHG) emissions.[18] Notably, publicly listed companies account for approximately 32% of total emissions, while state-owned entities contribute a significant 59%.[19] This section argues that the transition from traditional environmental compliance to holistic sustainability is imperative for corporations to effectively address climate change-related issues.

2.1. From Environmental Compliance to Holistic Sustainability

The larger stakeholder perspective also played a significant role in shaping corporate policies. Stakeholder perspective has reconstructed the notion of corporate existence. Nowadays the role of corporations seems to be multi-dimensional. A corporation is expected to fulfil legitimate societal expectations, including the protection of the

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17 ibid.

18 'New Report Shows Just 100 Companies Are Source of over 70% of Emissions - CDP' <https://www.cdp.net/en/articles/media/new-report-shows-just-100-companies-are-source-of-over-70-of-emissions>

19 ibid.

environment and climate, and to behave like a good corporate citizen.[20] Therefore, a proper balance between societal expectations and corporate activities is warranted.[21]

Advocates of the stakeholder perspective argue that businesses can and should operate for the common good rather than a mere vehicle of profit maximization for shareholders.[22] Owing to their integration with the social and ecological milieu, corporations derive resources from the natural and environmental fabric, thereby incurring a legal and ethical obligation towards ecological longevity. Consequently, they must be held accountable for the resultant impact of their action on the environment.

The archaic notion of corporate responsibility toward the environment has become obsolete in meeting the requirements of contemporary norms of stabilizing global ecological order.[23] The traditional regulatory approaches constrain the scope of environmental regulations to a perfunctory compliance exercise and render it a tick-box exercise.[24] Furthermore, despite including the environment under

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20 MuiChing Carina Chan, John Watson and David Woodliff, 'Corporate Governance Quality and CSR Disclosures' (2014) 125 Journal of Business Ethics 59.

21 Craig Deegan, *Financial Accounting Theory* (3. edition, reprint, McGraw-Hill 2010).

22 Hubert Joly, 'Harvard Business Review' (*Creating a Meaningful Corporate Purpose*, 2021) <https://hbr.org/2021/10/creating-a-meaningful-corporate-purpose>

23 Yingzheng Yan and others, 'Government Environmental Regulation and Corporate ESG Performance: Evidence from Natural Resource Accountability Audits in China' (2022) 20 International Journal of Environmental Research and Public Health 447.

24 Catherine Early, 'Why Environmental Principles Risk Becoming a "Tick Box Exercise"' <https://www.endsreport.com/article/1712973?utm_source=website&utm_medium=social>

Schedule VII of the Companies Act, 2013 to gain merit for corporate spending under CSR policy,[25] the climate change agenda seems to be rhetoric. The corporate legal policy of India renders CSR as mere corporate philanthropy rather than a holistic responsibility of the corporation.[26] As a result of which corporations tend to limit their actions to conforming with the minimum legal obligations, rather than adopting more comprehensive sustainability measures.[27] Therefore, there arises difficulty in evolving a more holistic and proactive approach. Adoption of a comprehensive environmentally sustainable policy, owing to enforcement conundrum, remains the key catalyst for the aforementioned transformation. Against this backdrop, it becomes crucial to examine how moving beyond compliance towards a holistic sustainability perspective reshapes corporate obligations, particularly through climate disclosure.

2.2. Holistic Approach to Corporate Responsibility: Exploring the Significance of Climate Change-related Disclosures

Having established the limitations of traditional compliance, this section explores how a holistic approach to corporate responsibility, anchored in climate change disclosures, can address these gaps. Empirical studies have demonstrated that '*Corporate Green*

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25 Companies Act, No. 18 of 2013, Schedule 7 (India).

26 Umakanth Varottil, 'Analysing the CSR Spending Requirements Under Indian Company Law' in Jean J Du Plessis, Umakanth Varottil and Jeroen Veldman (eds), *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (Springer International Publishing 2018) <http://link.springer.com/10.1007/978-3-319-69128-2_10>

27 Early (n 23).

Reputation', too, significantly impacts firms' financial performance. However, the database's focus on large firms may overlook the cumulative impact of smaller enterprises, which collectively contribute significantly to global emissions. Future research could expand the scope of analysis to include SMEs, providing a more comprehensive understanding of corporate environmental responsibility across all sectors.

Value systems, Green Branding, Sustainable Buying Behaviour, and many more metrics have been proven to have a significant impact on firms' financial performance. Thus, it becomes important for firms to adopt environmentally sustainable practices to enhance their performance and add to value creation.[28] Employing regulatory instruments to enforce environmentally sustainable practices can not only enhance firms' financial performance but also bolster the economy through positive externalities.

Recent trends in global corporate governance practices that have reshaped the corporate landscape have witnessed a paradigm shift in legal regimes from merely relying on environmental regulations to prioritizing the ESG model.[29] ESG framework refers to a set of guidelines and standards for evaluating a firm's performance based on

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[28] Witold Henisz, Tim Koller and Robin Nuttall, 'Five Ways That ESG Creates Value' (2019) 4 McKinsey Quarterly 1.

[29] Judy Oh, '3 Paradigm Shifts in Corporate Sustainability to New Era of ESG' (*World Economic Forum*, 30 September 2021) <https://www.weforum.org/agenda/2021/09/3-paradigm-shifts-in-corporate-sustainability-to-esg/>

numerous non-financial metrics.[30] From an ecological standpoint, an ESG framework must be adopted to include wider interests.

However, the aforementioned theoretical basis for imposing additional legal and moral obligations on corporations is narrow in its approach because of its wealth maximization and profit maximization agenda. As previously noted, a corporation is expected to fulfill societal demands and balance various stakeholders' interests, in this context, a proper disclosure framework in place is imperative.[31] Such a disclosure regime would entail a threatening effect on corporations to undertake environmentally unsustainable practices.

Climate change-related disclosures are a critical component of the ESG reporting agenda. These disclosures provide essential information about climate change-related risks and opportunities, enabling stakeholders to make informed decisions.[32] Companies may be required to disclose how their actions impact the climate, including information on greenhouse gas emissions[33], energy consumption and efficiency, climate change strategies and targets, internal climate-related policies, and the impact of climate change on their business and financial performance. These disclosures explain and quantify how

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30 Tenise Whelan and others, 'Uncovering the Relationship by Aggregating Evidence from 1,000 plus Studies Published between 2015–2020' [2022] NYU, ESG and Performance.

31 Dennis M Patten, 'Seeking Legitimacy' (2019) 11 Sustainability Accounting, Management and Policy Journal 1009.

32 Jill Atkins, *Corporate Governance and Accountability* (Fifth Edition, Wiley 2021).

33 Shamima Haque, Craig Deegan and Robert Inglis, 'Demand for, and Impediments to, the Disclosure of Information about Climate Change-Related Corporate Governance Practices' (2016) 46 Accounting and Business Research 620.

climate change-related risks and opportunities are identified, assessed, measured, and managed.[34]

It provides a comprehensive and holistic approach to encountering climate change issues through various facets. ESG agenda, which forces the board managers to provide climate change-related disclosures, breaks the barriers and intrudes on the foundation of corporate decision-making and therefore perturbs the very essence of corporate responsibility and facilitates sustainability strategy.[35] While the preceding discussion highlights the justifications for a broader corporate responsibility framework, it is essential to analyze how these principles are being codified into law. The next part examines India's legal landscape governing climate-related disclosures.

3. CLIMATE-CHANGE RELATED DISCLOSURE REGIME IN INDIA: AN EXPLORATION OF JURISPRUDENCE AND ANALYSIS OF LEGAL FRAMEWORK

Traditionally, corporate regulations across various jurisdictions have primarily focused on financial reporting to provide a comprehensive overview of a company's financial performance. In the Indian context, Section 129 of the Companies Act, 2013 obligates the management of the company to provide a true and fair view of the state of affairs of the company relating to its financials.[36] Nevertheless,

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[34] Office of the Auditor General of Canada Government of Canada, 'Research Paper on Climate-Related Financial Disclosures' (4 May 2022) <https://www.oag-bvg.gc.ca/internet/English/oth_202205_e_44031.html#hd2g>

[35] Jeremy Galbreath, 'ESG in Focus: The Australian Evidence' (2013) 118 Journal of Business Ethics 529.

[36] Companies Act, No. 18 of 2013, § 129 (India).

with the emergence of stakeholder activism, the ESG agenda has gained significant momentum.

There have been certain companies that undertook this initiative voluntarily.[37] However, a proper legal framework is imperative in enforcing the ESG agenda, ensuring uniformity and compliance. There is no single unified piece of legislation that covers climate change-related ESG disclosures. These laws include the Companies Act, 2013, the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (SEBI LODR Regulations), and other notifications / circulars / guidelines. Primarily, ESG reporting can be categorized into two broad categories: *materiality-based disclosures* and the *Business Responsibility and Sustainability Reporting* (BRSR) framework.[38]

3.1. Materiality-based Disclosures

Section 134(3) of the Companies Act, 2013, read with Rule 8 of the Companies (Accounts) Rules, 2014, mandates that the board report must be presented to shareholders at the annual general meeting.[39] This provision comprehensively enumerates various matters that must be included in the board's report. Among these, Section 134(3)(m) warrants particular attention as it addresses aspects of

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37 Ruchi Mann, '51% of India's Top 100 Listed Companies Disclosed Their Scope 3 Data for FY23 despite It Being a Voluntary Disclosure in the BRSR: PwC India Report' (*PwC*) <https://www.pwc.in/press-releases/2024/51-of-indias-top-100-listed-companies-disclosed-their-scope-3-data-for-fy23-despite-it-being-a-voluntary-disclosure-in-the-brsr-pwc-india-report.html>

38 Varottil (n 7).

39 Companies Act, No. 18 of 2013, § 134(3) (India).

climate change-related disclosures.[40] Specifically, it mandates disclosures regarding the conservation of energy, which include the steps taken or the impact on energy conservation, the measures adopted by the company to utilize alternative sources of energy, and the capital investment in energy conservation equipment.[41] This provision is limited in its ambit as it merely provides for disclosure about the conservation of energy and sets aside other aspects of climate-related risks and opportunities.

This provision was not introduced just in the 2013 Act as part of the ESG agenda; the erstwhile Companies Act, 1956 had a corresponding provision verbatim.[42] However, that provision was not there in the original draft of the 1956 Act, it was the result of legislative and judicial policy that underwent a massive transformation toward green jurisprudence in the 1980s. The provision was added by way of amendment in 1988[43]. This was the time when the legislature was attempting to bring environmental laws of India in line with the commitment under the Stockholm Conference.

Furthermore, the Board's Report should also indicate whether prior environmental clearance from the Central Government or the State Level Environment Impact Assessment Authority has been obtained for the construction of new projects or activities, or the expansion or modernization of existing projects or activities.[44]

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40 Companies Act, No. 18 of 2013, § 134(3)(m) (India).
41 Companies (Accounts) Rules, 2014, Gazette of India, Rule 8, (March 31, 2014).
42 Companies Act, No. 1 of 1956, § 217(1)(e) (India).
43 Inserted by the Companies (Amendment) Act, 1988 w.e.f. 1-4-1989
44 The Environment (Protection) Rules, 1986, Gazette of India, Section 6, (Nov. 19, 1986).

Similarly, Issue of Capital and Disclosure Requirements (ICDR) Regulations provide for disclosure at the time of raising capital. Regulations 24 and 70 of the ICDR Regulations provide that the "*draft offer document and offer document shall contain all material disclosures which are true and adequate to enable the applicants to take an informed investment decision*".[45] This regulation also mandates the disclosure of risk factors, which encompass not only immediate risks but also those anticipated in the future and known to the board. While the ICDR regulations do not explicitly specify climate change or environmental disclosures, they require issuers to disclose any information that could be considered material to investors.[46]

In addition to this, LODR Regulations mandate the listed companies to make disclosures, which in the opinion of the board, are material.[47] Though the regulation does not provide specific guidance on what information is deemed material, Indian regulators have construed the term '*material*' liberally.[48] Emphasis is more on the disclosure and not on the degree of materiality. This broad interpretation encompasses climate change-related risks within its scope.[49] Such materiality-based disclosure aims to introduce

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45 Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, Gazette of India, Reg. 70(1) and Reg. 24(1), (Sep. 11, 2018).

46 Shyam Divan, Sugandha Yadav and Ria Singh Sawhney, 'Directors' Obligations to Consider Climate Change-Related Risk in India'.

47 Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Gazette of India, Reg. 30, (Sep. 2, 2015).

48 DLF Limited v. Securities and Exchange Board of India, MANU/SB/0006/2015.

49 Divan, Yadav and Sawhney (n 45).

transparency on ESG (and other) issues that impact investors' decision-making, thereby aligning with the financial model of ESG.[50]

3.2. Business Responsibility and Sustainability Reporting (BRSR) Framework

The ESG reporting landscape in India has undergone prolonged evolution and transformation. It has been more than a decade since the legislature undertook the task of codifying ESG standards. This codification extends beyond the materiality standards as explained in the previous sub-part.[51] It would be imperative to discuss a brief background of the ESG Reporting framework in India.

3.2.1. Background of ESG Reporting in India

It started in 2009 with the commencement of the National Voluntary Guidelines on Corporate Social Responsibility released by the Ministry of Corporate Affairs (MCA).[52] This guideline provided certain fundamental principles purely voluntarily. However, this guideline did not provide anything about reporting.

The establishment of actual reporting standards commenced in 2011, with the MCA announcing the introduction of the National Voluntary Guidelines on Social, Environmental & Economic Responsibilities of Business (NVGs).[53] The NVGs were voluntary and

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50 Varottil (n 7).

51 ibid.

52 Ministry of Corporate Affairs, Corporate Social Responsibility Voluntary Guidelines 2009, Government of India, (Dec. 14, 2009), https://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf

53 Ministry of Corporate Affairs, National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business, 2011, Government

provided certain fundamental principles as to how businesses should operate ethically and with transparency. This was followed by the introduction of Business Responsibility Reporting (BRR) in 2012 when SEBI mandated that the top 100 listed companies by market capitalization include specific disclosures in their annual reports.[54] The BRR framework was built upon the superstructure of principles enumerated in NVGs. The scope of Business Responsibility Reporting (BRR) was subsequently expanded to encompass the top 500 listed companies and top 1000 listed companies by market capitalization in the year 2015[55] and 2019[56] respectively.

In 2019, MCA attempted to modernize NVGs in the form of the National Guideline for Responsible Business Conduct (NGRBCs).[57] These guidelines offered a more comprehensive forward-looking framework outlining fundamental principles for business conduct. Consequently, the imperative need to revise BRR led to its transformation into Business Responsibility and Sustainability Reporting,[58] (BRSR) in the lines of NGRBCs. In addition to other

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of India, (July 2011), https://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf

54 Securities and Exchange Board of India, Business Responsibility Reports (CIR/CFD/DIL/8/2012) (August 12, 2012), https://www.sebi.gov.in/legal/circulars/aug-2012/business-responsibility-reports_23245.html

55 Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Gazette of India, (Sep. 2, 2015).

56 Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Gazette of India, (Sep. 2, 2015).

57 Ministry of Corporate Affairs, National Guidelines on Responsible Business Conduct, Government of India, (Dec. 2018), https://www.mca.gov.in/Ministry/pdf/NationalGuildeline_15032019.pdf

58 *Supra* note 53.

disclosures, the BRSR framework provides for disclosures relating to climate change and environmental protection.

3.2.2. Substantive Climate Change Related Disclosure Requirements in BRSR

The BRSR framework is classified into three categories. Section one pertains to general disclosures, which also encompass certain environmental and climate-related information. It includes sustainability disclosures aligned with the principles of the National Guidelines for Responsible Business Conduct (NGRBC). The sustainability disclosures address all three domains of the ESG agenda, namely Environment, Society, and Governance. Therefore, it would take within its sweep general disclosures as per the company's understanding of what they perceive about the principles of NGRBC.

The entity must disclose material climate change-related risks or opportunities to its business. This includes classifying the risk or opportunity as environmental or social and providing a description, such as the impact of climate change on operations, worker health, or product demand and opportunities like cost savings through resource efficiency or new market access.[59] The rationale for identifying each climate change risk or opportunity should be explained in detail, as far as possible, including its associated impact. For identified climate change-related risks, the entity should describe its approach for its mitigation or adaptation. Additionally, the entity should indicate the positive and negative financial impacts of these climate change risks or

[59] Hemavathi S Shekhar and Vidhi Madaan Chadda, 'Disclosure Regime for Climate Change: Proposal and Prospects for India Inc' (2024) 8 Indian Law Review 42.

opportunities through qualitative disclosures, avoiding forward-looking quantitative information but including quantitative impacts from previous years.

The next section of the BRSR framework pertains to Management and Process Disclosures. Here, entities are required to disclose specific commitments, goals and targets along with their performance. This includes the baseline and context for the goals, entities covered, expected results, timelines, and whether the goals are mandatory or voluntary. The entity must report performance against each goal, including any changes, partial achievements, or delays with reasons. Additionally, a statement by the director responsible for the report should highlight climate change-related ESG issues, including the company's vision, strategy, priorities, broader trends, key events, performance views, outlook on challenges, and strategic approach.[60] This statement can be placed at the beginning of the report or under Section B. Companies must indicate if there is any specified Committee of the Board or a director responsible for decision-making on sustainability issues, disclosing their composition and categories.

Similarly, the third section of the BRSR framework provides disclosure requirements as per NGRBC's sixth principle which is "*Businesses should respect and make efforts to protect and restore the environment*".[61] It encompasses comprehensive reporting standards

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[60] Securities and Exchange Board of India, 'Business Responsibility and Sustainability Reporting (BRSR) — Effective May 2021' "SECTION B: MANAGEMENT AND PROCESS DISCLOSURES " (SEBI, May 2021) https://www.sebi.gov.in/legal/circulars/may-2021/business-responsibility-and-sustainability-reporting-by-listed-entities_50096.html

[61] *Supra* note 56.

across various domains. It includes reporting on energy consumption and intensity, compliance with the Perform, Achieve, and Trade (PAT) Scheme, water management practices, air emissions, greenhouse gas emissions (Scope 1 and Scope 2), waste management strategies, renewable energy consumption, water discharge details, Scope 3 emissions, biodiversity impacts in ecologically sensitive areas, resource efficiency initiatives, business continuity and disaster management plans, assessment of environmental impacts in the value chain, and disclosure of significant adverse environmental impacts.[62] Although the BRSR framework represents a significant codification of ESG principles in India, it is not without serious shortcomings. The following analysis highlights key challenges that undermine its efficacy.

4. NAVIGATING THE CHALLENGES BEFORE CLIMATE CHANGE-RELATED DISCLOSURE FRAMEWORK

Recently, the Indian Legislature has adopted a proactive stance towards the climate change-related disclosure policy framework. The discourse in the preceding section highlights the legislative efforts to codify Environmental, Social, and Governance (ESG) reporting standards. The BRSR framework is a step in the right direction and provides a uniform structure for ESG disclosures that emphasizes detailed and quantifiable data presentation.[63] However, ESG reporting is still a work in progress. There are quite many challenges before the ESG framework in India. This section identifies certain elements in

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62 *Supra* note 53.
63 Jain (n 11).

the existing framework that render the climate change-related ESG disclosure framework ineffective.

4.1. The Dormant Duty: Unleashing the Environmental Mandate of Section 166(2)

It is worth noting that the jurisprudence revolving around stakeholder theory and the ESG agenda is at the intersection as both have stakeholder-centric approaches. In India, Section- 166(2) of the Companies Act, 2013 mandates the directors to consider the best interest of the company along with the interests of other stakeholders including employees, shareholders, the community, and the environment.[64] Unlike the English Model of Enlightened Shareholder Value (ESV), Section 166(2) of the Companies Act, 2013 follows a pluralistic approach that places the interests of multiple stakeholders including the environment at par with the interests of shareholders without any hierarchy.[65]

The question remains whether a company's directors owe certain obligations to the environment. If the assertion is affirmative [as suggested by Section 166(2)], the environment should have

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[64] Companies Act, No. 18 of 2013, § 166(2), (India). See also *M.K. Ranjitsinh v. Union of India* (also known as the *Great Indian Bustard* case), wherein the Supreme Court reaffirmed that Section 166(2) imposes a duty on company directors to act in good faith, ensuring not only the best interests of the company, its employees, shareholders, and the community but also the protection of the environment.

[65] Rishabh Mohnot and Hrithik Merchant, 'Analyzing Directors' Duty of Care under the Companies Act, 2013' (*IndiaCorpLaw*, 29 March 2023) <https://indiacorplaw.in/2023/03/analyzing-directors-duty-of-care-under-the-companies-act-2013.html>

recourse to remedies in the event of a breach of such obligations. [66] Supreme court in *M.K. Ranjitsinh v. Union of India*[67] held that a decision made in the company's and its shareholders' financial interests, but harmful to the environment, may violate Section 166(2). Moreover, such a decision could subject the company to litigation risks, regulatory transition risks due to tightening environmental laws, and the potential for asset stranding.[68] Directors of Indian companies are not merely given the option to consider climate risk and environmental protection voluntarily; rather, it is a legal obligation.[69] Ignoring these responsibilities can expose them to liabilities for breach of duty.[70]

However, the mere existence of this legal duty does not guarantee effective enforcement. A major challenge arises in ensuring that directors are held accountable when they fail to fulfill their environmental responsibilities. Despite these statutory obligations, enforcement mechanisms remain weak. The provisions relating to derivative action and class action suits have been restrictive in their approach to allow non-shareholder constituents to institute a suit in case of breach of such obligation.[71] Due to the complexity involved in enforcing such obligations, the public and private enforcement

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66 Mihir Naniwadekar and Umakanth Varottil, 'The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis' [2016] NUS Centre for Law & Business Working Paper 16/03 95.

67 *MK Ranjitsinh v Union of India* AIR 2021 SC 209.

68 ibid.

69 ibid.

70 Varottil, Umakanth, Directors' Liability and Climate Risk: White Paper on India (October 4, 2021). Commonwealth Climate and Law Initiative, Available at SSRN: https://ssrn.com/abstract=3936428

71 Abhyudaya Yadav and Anshita Dave, 'Dilating the Scope of Oppression and Mismanagement under the Companies Act, 2013: A Measure to Fortify Corporate Governance' (2023) 9 NLUJ Law Review 33.

mechanisms have been demonstrated to be ineffectual in addressing non-compliance with directors' duties.[72] Ultimately, the statutory provisions imposing directors' duties to consider the interests of non-shareholder constituencies are not enforceable by their ultimate beneficiaries.[73]

In addition to this, the lack of enforcement of directors' and controlling shareholders' fiduciary duties renders the derivative suit mechanism ineffective, which, for shareholders, serves as the final remedy.[74] These suits, which are primarily intended to safeguard shareholder value, do not extend legal recourse to environmental or community stakeholders adversely affected by corporate practices that contribute to climate risks.[75]

Provisions related to oppression and mismanagement offer a potential remedy when a company's affairs are conducted in a manner detrimental to the interests of the company or the public.[76] Climate change-related concerns or directors' actions involving climate risks can arguably fall within both these categories.[77] However, a significant limitation of this remedy is the requirement that the circumstances must justify the winding up of the company. This presents a critical

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72 Astha Pandey and Ram Mohan M. P., 'Re-Evaluating Corporate Purpose: A Critical Assessment of the Indian Stakeholder Governance Framework through a Historical and Comparative Analysis' [2024] SSRN Electronic Journal <https://www.ssrn.com/abstract=4874378>

73 Naniwadekar and Varottil (n 63).

74 Pandey and M. P. (n 73).

75 Yadav and Dave (n 72).

76 ibid.

77 Varottil, Umakanth, Directors' Liability and Climate Risk: White Paper on India (October 4, 2021). Commonwealth Climate and Law Initiative, Available at SSRN: https://ssrn.com/abstract=3936428

challenge, as environmental concerns severe enough to warrant corporate dissolution likely indicate substantial violations of environmental regulations. In such cases, both the company and the responsible officers would face legal consequences under environmental laws. However, this intervention occurs at the final stage of corporate failure—when the company is already facing winding up dissolution—rather than at the operational stage, where adherence to sustainable practices and directors' duties is most crucial.

Furthermore, both derivative suits and the remedy for oppression and mismanagement can only be invoked by shareholders, thereby excluding other key stakeholders such as employees, environmental groups, and affected communities. This shortfall is exacerbated by the fact that shareholders generally lack the incentive to file derivative suits over environmental issues, as such concerns rarely translate into direct financial harm.[78] Given these limitations in private enforcement, one might expect stronger public enforcement mechanisms to fill this gap. However, government intervention in corporate mismanagement is similarly constrained.

On the public enforcement front, the Central Government is empowered to initiate action against a company under oppression and mismanagement when corporate actions interfere with the public interest. However, this power has significant limitations, as government intervention is typically reserved for instances of systemic corporate collapse or severe economic repercussions. Environmental

[78] Yadav and Dave (n 72).

concerns arising from corporate activities are likely to go unnoticed, as it is practically impossible for state agencies to monitor and regulate every corporation effectively.

As a result, even though the BRSR framework mandates climate change-related disclosures, significant environmental risks continue to be overlooked and inadequately addressed due to a lack of *locus standi* for environment-related concerns. In the wake of ineffective public and private enforcement mechanisms, obligations under the BRSR framework remain unaddressed. This phenomenon weakens the ESG regulations and ultimately results in corporate greenwashing since there is no enforcement which stems from non-credible climate change-related disclosures.

4.2. Lack of Board Sensitization and Inadequate Climate Governance Education

If the legal framework remains under-enforced and ineffectual, board sensitization emerges as a viable solution to ensure the credibility of climate change-related disclosures. Board sensitization on climate change and environmental protection is crucial, as a board lacking climate governance expertise is unlikely to integrate climate considerations into corporate decision-making.[79] When directors lack the expertise to oversee sustainability reporting, climate disclosures

[79] Robert G Eccles and Svetlana Klimenko, 'The Investor Revolution' (2019) 97 Harvard Business Review 106.

under the BRSR framework risk being inconsistent and unreliable, and become performative rather than substantive.[80]

Educational qualities are one of the significant factors that reduce ESG-related controversies including quality ESG reporting.[81] Contingency learning through paired stimulation was conceptualized where responses are directly linked to stimuli, while reinforcement alters preexisting behavior by regulating responses through immediate consequences, without conscious involvement.[82] Psychological treatment through sensitization will intrude into the decision-making process by the board. Since not all board members possess adequate knowledge and understanding of sustainability, it is crucial to integrate this issue into recruitment, education, and reward processes.[83]

The board's sensitization toward climate change and the environment too has limitations at least in the course curriculum that prepares Corporate Managers. Upon meticulous examination of the course curriculum of Chartered Accountants, Company Secretaries, and MBA programs at top business schools in India, it is evident that they fall short of adequately covering risk management and sensitivity toward climate change and the environment. Most of their curriculum

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80 Ellen Pei-yi Yu, Bac Van Luu and Catherine Huirong Chen, 'Greenwashing in Environmental, Social and Governance Disclosures' (2020) 52 Research in International Business and Finance 101192.

81 Ioannis Passas and others, 'ESG Controversies: A Quantitative and Qualitative Analysis for the Sociopolitical Determinants in EU Firms' (2022) 14 Sustainability 12879.

82 Albert Bandura, 'Self-Efficacy: Toward a Unifying Theory of Behavioral Change.' (1977) 84 Psychological Review 191.

83 'Accompagnement directive CSRD Corporate Sustainability Reporting Directive | Solutions France' <https://solutions.bureauveritas.fr/needs/accompagnement-directive-csrd-corporate-sustainability-reporting-directive>

focuses on wealth management and profit maximization, delving deeply into economic theories and case studies of successful business ventures that yield high profits, rather than preparing them to protect the interests of multiple stakeholders. Moreover, many corporate houses do not organize adequate training sessions or workshops on these topics, rendering corporate managers insensitive to climate change and environmental issues.

One empirical report[84] suggests that 85% of respondents accept that their board needs to improve their knowledge regarding climate change. In addition to this, 69% of respondents accept that climate change knowledge is not one of the formal requirements for their appointment to the board.[85]

In light of the ineffectual and under-enforced duty of directors to preserve the environment, coupled with the lack of sensitivity among corporate managers regarding climate change, their corporate actions will not uphold the positive obligation under Section 166(2). Consequently, if their actions do not align with stakeholder interests as envisioned under Section 166(2), their disclosures will lack integrity and consistently be of poor quality.

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84 'Changing the Climate in the Boardroom' (Heidrick & Struggles 2021) <https://www.heidrick.com/-/media/heidrickcom/publications-and-reports/changing-the-climate-in-the-boardroom.pdf>.

85 ibid.

4.3. Perils of Quantitative and Qualitative Disclosure Gaps: Paradox of Uniform Disclosure Framework for Multiple Sectors

BRSR framework, concerning climate change-related disclosures, entails quantitative and qualitative parameters. In the case of the former, corporations are expected to provide climate change-related disclosures by providing quantifiable information. What are energy consumption and fuel consumption from renewable and non-renewable energy sources, energy intensity, withdrawal of water from different resources, GHG emission, Waste management, etc? In the case of the latter, Corporations are expected to provide non-quantifiable information. They are expected to disclose information about their risk management policies, and the procedure to identify climate change-related risks and opportunities. Additionally, they are expected to provide subjective information on quantitative parameters.[86]

Despite it being a significant move toward inclusive corporate governance, the BRSR framework remains insufficient and ineffectual. Quantitative parameters render this a mere perfunctory compliance exercise whereas ingrained subjectivity in qualitative parameters renders it directionless. Overreliance on numbers in the absence of benchmarks creates the illusion of objectivity whereas qualitative disclosure often uses generic and non-standardized language that is

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[86] PricewaterhouseCoopers, 'Embracing Climate-Resilience: A New Era of Disclosure for Indian Financial Entities' (*PwC*) <https://www.pwc.in/blogs/disclosure-framework-on-climate-related-financial-risks-2024.html>.

vague. Illustratively, Reliance Industries reports an energy consumption of 46,42,00,812 GJ[87], while HDFC Asset Management reports 17,860 GJ[88]. However, in the absence of a reference range or sectoral benchmarks, these figures lack contextual meaning, making it difficult to assess their relative environmental impact or sustainability performance.

Practitioners call it a generic and boilerplate arrangement for being too simplistic.[89] In the quest for uniformity, the BRSR framework lacks comprehensiveness. The key reason for this superficiality is the framework's reliance on a one-size-fits-all approach that fails to address the differences between industries and their operations.

There are currently no sector-specific disclosure requirements despite the significant differences in climate risks, opportunities, and ESG impacts across various sectors. The environmental impact of manufacturing corporations, which contribute almost a quarter of direct GHG emissions, is invariably greater than that of corporations operating within the service sector.[90] Even within their respective categories, the nature of production or services provided by

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87 Reliance Industries, BRSR Report 2023-24, Available at: https://rilstaticasset.akamaized.net/sites/default/files/2024-08/BRSR202324.pdf

88 HDFC Bank, BRSR Report 2023-24, Available at: https://files.hdfcfund.com/s3fs-public/2024-07/HDFC%20AMC%20BRSR_03.07.24.pdf

89 Jain (n 9) 2.

90 Martin Lundstedt, 'How Manufacturing Can Raise the Bar on Global Climate Goals' (*World Economic Forum*, 14 June 2021) <https://www.weforum.org/agenda/2021/06/manufacturing-industry-climate-change-goals/>

corporations results in varying impacts on climate. This uniform approach not only limits the comprehensiveness of disclosures but also fails to account for industry-specific challenges. For instance, within the production sector, carbon-intensive steel and cement manufacturing,[91] companies inherently pose a greater threat to the climate than FMCG companies.

No sector-specific parameters exist in the BRSR framework to assess substantive corporate behavior concerning climate change and the environment. Sector-specific climate-change-related disclosure requirements will provide relevant and material information to the intended audience.

Recently, Havells disclosed in its ESG report that it has decided to make its products with radioactive-free components.[92] It has eliminated the Kr-85 radioactive isotope from the entire CMI (Ceramic Metal Halide) lighting range.[93] Such sector-specific disclosures would enhance comparability and benchmarking of parameters among same-sector industries. An example of Havells would guide other companies in the same sector to adopt strategies to eliminate radioactive components and similar harmful agents from their manufacturing process.

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91 'Transforming Carbon-Intensive Industries' (*Bezos Earth Fund*) <https://www.bezosearthfund.org/ideas/transforming-carbon-intensive-industries>

92 Havells, Sustainability Overview, https://havells.com/corporate/sustainability/sustainability-overview (last visited Aug. 18, 2024).

93 *Id.*

BRSR framework's reliance on uniform quantitative and subjective qualitative metrics results in inconsistent and superficial disclosures. Understanding of these central gaps in the framework is critical to examine holistic sustainability. Despite the progressive intent of the legislature, BRSR framework fails to capture the substantive ESG agenda.

Due to the absence of sector-specific climate-related disclosure requirements, the BRSR framework has become yet another compliance exercise for corporate management, similar to how the CSR regime has been reduced to mere corporate philanthropy.[94]

4.4. Decoding the Investor-Driven Paradigm of ESG Reporting Agenda

Despite allegiance to stakeholderism, the disclosure framework fundamentally bypasses stakeholder interests due to its inherent shareholder-centric justification for climate change-related disclosures. The most apparent justification for a mandatory disclosure framework is to allow investors to make informed investment decisions by reducing information asymmetry.[95] Disclosures act as catalysts in maintaining informational efficiency, enabling investors to gather information at reduced cost compared to a corporate landscape without disclosures.[96]

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94 Varottil (n 27).

95 Anik Bhaduri, 'Taking the Heat:(Non) Disclosure of Climate Change Risks in India' (2021) 42 Business Law Review.

96 Paul G Mahoney, 'Mandatory Disclosure as a Solution to Agency Problems' (1995) 62 The University of Chicago Law Review 1047.

Efficient Market Hypothesis[97], Governance and Investor Suffrage[98], Corporate Green Reputation, Socially Responsible Investing[99] are among the major justifications that have shareholderism at their core. Some empirical studies conclude that companies venturing into ESG agenda is an essential indicator of enhanced financial performance.[100] These justifications prioritize shareholder value, positioning mandatory climate change disclosures as a tool for value creation rather than as measures to protect the environment and mitigate climate change risks.

In global policy formulation, the principal motivation behind the Securities Exchange Commission's (SEC) disclosure regime, from where our disclosure regime takes lessons, is the belief that effective financial 2markets depend on investors having access to accurate information essential for informed investment and voting decisions.[101] It was believed that disclosures would promote market efficiency, facilitate capital formation, and encourage competition.[102] However, the question arises as to whether climate change-related disclosures are necessary to promote the aforementioned objectives. The SEC affirmatively responded 'yes' with the justification that the growing threat posed by climate change makes it clear that information

97 Eugene F Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25 The Journal of Finance 383.

98 Mahoney (n 97).

99 Cynthia A Williams, 'The Securities and Exchange Commission and Corporate Social Transparency' (1998) 112 Harvard Law Review 1197.

100 Whelan and others (n 31).

101 Wasim (n 3).

102 Securities and Exchange Commission, Concept Release on Disclosure of Business or Financial Information about Market Risk, Release No. 33-10064 (Apr. 8, 2016), https://www.sec.gov/files/rules/concept/2016/33-10064.pdf.

concerning the environmental impact would be instrumental in the assessment of corporate risks and valuation.[103]

Similarly, the Taskforce on Climate-related Financial Disclosures (TCFD) holds a pivotal position on the global stage. It is essential to recognize, however, that the TCFD's recommendations emerged in response to demands from private-sector financial institutions and investors. Their primary objective was to improve climate-related disclosure frameworks to facilitate more informed investment decisions.[104] This investor-centric approach is evident in the statements made by leaders of the taskforce. Gek Choo Goh, for instance, justifies the need for climate-related disclosures by emphasizing their role in quantifying climate-related risks, which subsequently facilitates more efficient capital allocation decisions.[105] Likewise, Michael R. Bloomberg, the chairman of the TCFD, asserts that the task force's purpose is to establish a framework that enables investors to assess potential climate risks, thereby aiding them in making more informed investment decisions.[106]

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103 *Id.*

104 'Task Force on Climate-Related Financial Disclosures' (2022) <https://assets.bbhub.io/company/sites/60/2022/12/tcfd-2022-overview-booklet.pdf>.

105 'NGFS Publishes Two New Documents on Climate-Related Risk Differentials and Credit Ratings' (*Banque de France*, 19 May 2022) <https://www.ngfs.net/en/communique-de-presse/ngfs-publishes-two-new-documents-climate-related-risk-differentials-and-credit-ratings>

106 Dina Medland, 'Banks And Insurers Support Task Force Recommendations On Climate-Related Financial Disclosure' (*Forbes*) <https://www.forbes.com/sites/dinamedland/2017/06/29/banks-and-insurers-support-task-force-recommendations-on-climate-related-financial-disclosure/>

In addition to this, the disclosed information is tested on the anvil of materiality.[107] The term "*materiality*" has not been defined in the Companies Act, 2013, nor the Securities Regulations, including the LODR Regulations and the BRSR Format. Indian judiciary largely follows the US approach in determining the contours of materiality.[108] US Supreme Court in one of the significant rulings asserted, "*materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information*"[109]. Similarly, in India, the Securities Appellant Tribunal (SAT) held that *"Disclosure…which is required to be made in the offer documents, is one which, if concealed would have a devastating effect on the decision-making process of the investors, and without which the investors could not have formed a rational and fair business decision of investment*".[110] In several cases, SEBI has followed the same approach in its orders.

Furthermore, the BRSR framework applies exclusively to the top 1,000 publicly listed companies by market capitalization, excluding unlisted and large private companies whose environmental and climate impact may be more significant than some of the publicly listed companies obligated under the LODR regulations for climate change-related disclosures. This omission from the climate change-related ESG reporting framework is primarily due to the restriction on public investors from directly investing in such organizations. For instance, the Serum Institute of India, a pharmaceutical giant with a market

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107 Bhaduri (n 96).
108 ibid.
109 Basic Inc. v. Levinson 485 U.S. 224 (1988)
110 DLF Limited v. SEBI, 2015 SCC OnLine SAT 54.

capitalization of Rs. 1,92,300 crore[111], which is an unlisted company that may significantly contribute to environmental pollution and climate change due to the release of large amounts of bio-waste.

The shareholder-centric approach is inherently anthropocentric. In contrast, contemporary environmental regulations are eco-centric for addressing environmental protection-related concerns. The regime for climate change-related disclosures lacks the true essence of stakeholderism. The climate change-related disclosure framework is molded in the systemic bottleneck of shareholder primacy, thereby undermining substantive environmental and climate-related concerns. The structural and functional elements of the BRSR framework fundamentally serve shareholders and investors as beneficiaries.

While the current BRSR framework, influenced by shareholder interests, and the materiality-related climate change disclosures in board reports align with SEBI's statutory goal of investor protection[112], they do not adequately address climate change at its core. Climate change-related disclosures hold value only when investors or shareholders perceive them as financially beneficial. Ultimately, by emphasizing shareholder value over environmental sustainability, the

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111 'Not NSE. This Vaccine Maker Is India's Most Valuable Unlisted Company: Burgundy Private-Hurun' *The Economic Times* (20 June 2023) <https://economictimes.indiatimes.com/news/company/corporate-trends/not-nse-this-vaccine-maker-is-indias-most-valuable-unlisted-company-burgundy-private-hurun/articleshow/101135976.cms?from=mdr>

112 Securities and Exchange Board of India, Preamble and Introduction, https://www.sebi.gov.in/sebi_data/commondocs/eoi_p.pdf (last visited Aug 13, 2024).

BRSR framework contradicts its intended purpose, transforming climate change disclosures into a tool for financial risk assessment rather than a means of ensuring genuine ESG accountability.

4.5. Pitfalls of Unverified and Unenforced Disclosures

As noted earlier, the disclosure framework is primarily intended to serve investors.[113] There exists no intended audience concerning climate change-related disclosures.[114] Despite the materiality of disclosure affecting a diverse range of stakeholders including environment and climate[115], materiality and value held by these climate change-related disclosures are assigned by investors and shareholders.

The narrow focus on investors overlooks the fact that climate change-related disclosures are inherently valuable to a diverse range of stakeholders. Regulatory bodies, non-governmental organizations, and local communities are among the stakeholders who all have a vested interest in the social and environmental impacts of the activities of the corporation. The absence of a precise audience lacks stakeholder engagement and thereby renders the whole ESG agenda lying on deathbeds. This issue is further compounded by the lack of third-party verification, as companies are not required to independently validate their sustainability claims, allowing them to selectively present data without scrutiny.

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113 Varottil (n 7).
114 ibid.
115 ibid.

Furthermore, unlike Singapore and Hong Kong, the disclosure framework in India does not require third-party verification.[116] A robust third-party verification mechanism involves an independent assessment of materiality which ensures accuracy and completeness of the disclosures. The lack of a precise intended audience coupled with the absence of third-party verification of the climate change-related ESG disclosures impairs its credibility and veracity.[117] Therefore, in such analogous scenarios, corporations may engage in greenwashing where they may attempt to exacerbate and fabricate the disclosures to appear more sustainable.[118]

5. REFORMING THE CLIMATE DISCLOSURE LANDSCAPE: A ROADMAP

5.1. Board Sensitization and Corporate Education

The board sensitization tactics should resurge with the integration of climate change knowledge and sensitivity toward environmental issues. Studies have shown that higher education curricula contribute to proactive environmental attitudes.[119] Environmental attitudes are recognized as the foundational element shaping citizens' environmental choices and decisions.[120] In other

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116 Saurav Kumar, Rohit Ambast and Shreya Chaturvedi, 'ESG REPORTING AND ITS FRAMEWORK IN INDIA – Legal Developments' <https://www.legal500.com/developments/thought-leadership/esg-reporting-and-its-framework-in-india/>

117 Varottil (n 7).

118 Yu, Luu and Chen (n 81).

119 Eleftheria Fytopoulou and others, 'Effects of Curriculum on Environmental Attitudes: A Comparative Analysis of Environmental and Non-Environmental Disciplines' (2023) 13 Education Sciences 554.

120 ibid.

words, environmental attitudes can translate into actual behaviors, which, in turn, influence the environment.[121] Building on this relationship, citizens with pro-environmental attitudes are more likely to adopt responsible habits and behaviors that contribute to environmental sustainability.[122]

There should be mandatory training programs for corporate managers, regulated by SEBI, the Ministry of Corporate Affairs (MCA), and the Indian Institute of Corporate Affairs (IICA), and changes in course curricula for management courses by IIMs, ICAI, ICSI, etc focusing on the latest developments and trends relating to ESG-related practices. Such an initiative should emphasize aligning profit maximization with the protection of diverse stakeholders including the environment.[123] Embedding these principles in the course curricula and formal training program, the corporate sector can cultivate leaders who are driven by not only financial success but also committed to sustainability.[124]

5.2. Inclusion of Sector-Specific Disclosure Requirements

The legislative focus should be shifted from the one-size-fits-all approach to holistic sector-specific disclosure requirements. There

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121 Ding Li and others, 'What Influences an Individual's Pro-Environmental Behavior? A Literature Review' (2019) 146 Resources, Conservation and Recycling 28.

122 Lorenz M Hilty and Patrizia Huber, 'Motivating Students on ICT-Related Study Programs to Engage with the Subject of Sustainable Development' (2018) 19 International Journal of Sustainability in Higher Education 642.

123 Eccles and Klimenko (n 80).

124 R Edward Freeman and others, *Stakeholder Theory: The State of the Art* (1st edn, Cambridge University Press 2010) <https://www.cambridge.org/core/product/identifier/9780511815768/type/book>

is an imperative need to tailor climate change-related disclosure guidelines that cater to unique risks and challenges posed by specific sectors. The framework should encourage contextual qualitative disclosures on sector-specific risk management policies, climate risk identification techniques, and mitigation strategies. Refine quantitative metrics by introducing sector-specific metrics that are tailored to environmental impacts, such as pollutants, waste management, and energy efficiency for manufacturing.

Recently, the Reserve Bank of India (RBI) introduced a draft Disclosure Framework on Climate-Related Risks, 2024, applicable to all scheduled commercial banks, non-banking financial companies (NBFCs), All India financial institutions, cooperative banks, and similar entities.[125] This draft is designed to inform these organizations about their climate-related risks and opportunities, ensuring that all users of their financial statements are well-informed. It also aims to enhance market discipline. Additionally, the draft mandates an internal control assessment by a committee established by the RBI. Tailored to the operational workings of banking and financial institutions, including foreign entities, this draft is specifically targeted at regulated entities that fall under the RBI's jurisdiction.

Such a legislative exercise should be supplemented with inputs from industrial leaders, sectoral regulators (e.g., SEBI for financial markets, IRDAI for insurance, RBI for banking, FSSAI for food

[125] Reserve Bank of India, Press Release, Draft Disclosure framework on Climate-related Financial Risks, 2024, (DOR.SFG.REC/30.01.021/2023-24), (Feb 2024), https://www.rbi.org.in/Scripts/bs_viewcontent.aspx?Id=4393.

industries, etc), and sectoral associations. Ministry of Corporate Affairs should encourage industry leaders from multiple sectors to come forward and contribute to legislative policy framing. The best practices from sector-specific industry leaders must be incorporated within the BRSR framework. Such inputs from industry leaders, sectoral leaders, and sectoral associations would provide benchmarking and parameters for comparability across companies within the same industry. Customizing the disclosure requirement will ensure the disclosures are relevant and reflect best environmental practices.

5.3. Relaxing *Locus Standi* for Derivative Actions and Enhancing Verifications through Internal Control Assessments

The rules of *locus standi* for derivative actions or class action suits should be relaxed, and the scope of these remedies should be expanded to allow non-shareholder constituents—such as Non-Governmental Organizations, regulatory bodies, and communities—to represent the environment and climate in cases of breaches of directors' duties or instances of oppression and mismanagement that affect the environment and climate. The qualitative and quantitative criteria for invoking Section 241 and Section 244 of the Companies Act, 2013, should be modified to provide sufficient flexibility for representatives of the environment or climate to have standing in courts or tribunals.[126]

[126] Yadav and Dave (n 72).

In addition, the Reserve Bank of India's (RBI) draft on climate change-related disclosures proposes an internal control assessment to be conducted by a committee established by the RBI.[127] This thorough examination by the RBI is designed to review the disclosures at multiple levels, ensuring a comprehensive evaluation. Similarly, for other sectors, it is crucial to involve sectoral regulators and other stakeholders in the internal control assessment process.

Entrusting sectoral regulators with the authority to review climate change-related disclosures, through internal control assessments, is warranted due to their specialized expertise and technical proficiency. For instance, the Telecom Regulatory Authority of India (TRAI) could act as the primary regulator for reviewing disclosures from telecom companies, while the Securities and Exchange Board of India (SEBI) could oversee mutual funds, alternative investment funds (AIFs), stock exchanges, and brokerage firms. Similarly, the Insurance Regulatory and Development Authority of India (IRDAI) could regulate disclosures for insurance companies, the Food Safety and Standards Authority of India (FSSAI) for the food industry, and NASSCOM for IT companies. Such a review mechanism must be supported by granting *locus standi* to these sectoral regulators, enabling them to bring matters before the courts.

A legislative policy that implements robust enforcement mechanisms for the rights of multiple stakeholders, including the environment, will ensure that the disclosure framework in that

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127 *Supra* note 110.

jurisdiction is sufficiently rigorous to safeguard environmental interests in substance rather than merely fulfilling procedural obligations.

5.4. Redefining Materiality

The legislative and judicial policy inclined toward shareholder or investor-centric foundations of corporate law should be modified to accommodate wider stakeholder interests, including environment and climate, within the contours of "*materiality*". The term "*materiality*" has been interpreted liberally to include environmental and climate-related concerns. However, the purpose of materiality is restricted to primarily serving the interests of investors to make more informed decision-making concerning their investments.

"*Materiality*" should be reinterpreted to address substantive environmental concerns, rather than being confined to the context of investment decision-making. The purpose of climate change-related disclosures should extend beyond merely informing investors; it should encompass the interests of all stakeholders affected by corporate actions. Such a legislative and judicial policy would fundamentally enforce the principles enshrined under Regulation 4(2)(d) of SEBI (LODR) Regulations, 2015.[128] To ensure a more comprehensive approach, stakeholder engagement, and third-party verification should be integral to the materiality assessment process. Any failure to adequately consider material environmental issues

[128] Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Gazette of India, Reg. 4(2)(d), (Sep. 2, 2015).

should provide grounds for a derivative action or *suo moto* action by courts or reference to specialized tribunals like NGTs.

5.5. Leveraging Artificial Intelligence (AI) for Enhanced Disclosures

Corporations should leverage Artificial Intelligence (AI) to address the challenges associated with non-financial disclosures, particularly in areas such as climate change and environmental impact. AI technologies can transform large, fragmented datasets into unified and structured information, which can significantly enhance decision-making and reporting processes.[129] For example, AI-assisted tools like Benchmark Gensuite can perform specialized assessments, identify anomalies, and generate tailored disclosures based on specific frameworks.[130] These tools can also compare a company's current practices against established guidelines, providing precise insights into compliance gaps and recommending pathways to align with sustainable practices.[131] Furthermore, AI technologies can be customized to meet sector-specific requirements. A key contribution of AI to sustainability lies in its predictive analytics, which enables leaders to anticipate future ESG trends, identify potential risks, and

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[129] Maria Patschke, 'Three Ways AI Can Transform ESG Reporting' (*ESG Today*, 18 June 2024) <https://www.esgtoday.com/guest-post-three-ways-ai-can-transform-esg-reporting/>

[130] *How to Leverage AI in ESG Reporting & Disclosures*, (2024), https://benchmarkgensuite.com/ehs-blog/leveraging-ai-for-sustainability-reporting/ (last visited Aug 13, 2024).

[131] ibid.

uncover opportunities for improving the sustainability of processes and products.[132]

6. CONCLUSION

While the Business Responsibility and Sustainability Reporting (BRSR) framework represents a significant step in codifying climate change-related non-financial disclosures, it remains a work in progress. This paper highlights several anomalies within India's current climate change-related disclosure framework, with enforcement conundrums and the lack of sector-specific disclosures being among the most pressing issues that need to be addressed.

The legal obligations of directors under Section 166(2) of the Companies Act, 2013, and the evolving landscape of ESG must transcend the boundaries of ineffectual enforcement to pave the way for meaningful change. Such a transformation can be achieved by relaxing the rules of *locus standi* to allow non-shareholder constituents to enforce these duties. This legislative initiative would not only enhance the climate change-related disclosure regime but also have far-reaching consequences for other non-shareholder constituents, such as employees, the community, and society at large for protecting their interests.

This paper proposes a multifaceted approach to the climate change-related disclosure framework to address those shortcomings. These recommendations can be incorporated in a phased manner.

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[132] Mark Segal, 'How AI Is Transforming ESG Reporting' (*ESG Today*, 29 January 2024) <https://www.esgtoday.com/guest-post-how-ai-is-transforming-esg-reporting/>

Such a lengthy exercise would require the concerted effort of the legislature, industry leaders, judiciary, and other stakeholders to create a climate change-related disclosure framework that serves the broader goal of sustainable development in substance.

While the BRSR framework provides a foundational structure to ESG reporting in India, some reforms are imperative to realize its true potential. These reforms will break the shackles of opaque legislative policy moulded in the systemic bottleneck of shareholder primacy. The evolving landscape of corporate responsibility, at least in the context of environmental sustainability, is more than mere surface-level compliance. Philosophy of Indian corporate laws have undergone substantial transformation post-independence with the inclusion of stakeholderism at the core. Such a legislative intent aligns with India's commitment to a welfare state and to encounter crony capitalism rampant in the West, especially the US and UK (in the late 19th and early 20th century). The suggested reforms in climate change-related disclosure regimes are grounded in a holistic, stakeholder-oriented approach, which departs from the Anglo-American conception of corporate existence and aligns with the philosophy of Indian corporate laws. Such eco-centric and stakeholder-oriented reforms in climate change-related disclosures would provide valuable lessons to other nations in transforming their disclosure frameworks with a stakeholder model of governance.

ARBITRATING THE CLIMATE CRISIS: INTERNATIONAL MECHANISMS AND NATIONAL RESPONSES

Paridhi Gupta[*] *& Khushi Bansal*[♦]

Abstract

Climate change disputes have emerged as a legal challenge, which are particularly driven by anthropogenic impacts all across the globe and on the regulatory landscape. These disputes majorly arise out of international agreements such as the UNFCCC and the Paris Agreement. They underscore essential phenomena such as corporate liability, investor-state and environmental restoration agreements. The unique complexity of these disputes demands subject-specific and technical arbitration mechanisms. To achieve this, the authorities may look to leverage frameworks like the International Chamber of Commerce task force and Permanent Court of Arbitration environmental rules, however, it must be done flexibly and maintaining party autonomy.

This paper aims to comprehensively delve into India's evolving landscape with respect to climate change disputes, specially highlighting the role of specialised mechanisms like the National Green Tribunal mechanisms. Further, this paper analyses the

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Kishenganga Arbitration Case to illustrate the balance it created in terms of balancing competing environmental interests and setting global precedents. Additionally, climate finance mechanisms (in terms of regulation of green bonds) also seek to verify compliance and tackle disputes. By emphasising on these pertinent issues, as discussed, this paper calls for innovative, efficient and inclusive approaches to resolve the climate change disputes vis-à-vis aligning with the global sustainable development policy.

Keywords: - Climate Change Disputes, Environmental Arbitration, Green Bonds, UNFCCC, Dispute Settlement Mechanisms.

1. INTRODUCTION

Defining climate change conflicts and delineating their classification is inherently linked to the more significant knowledge of climate change itself. Primarily, Article 1 of the "United Nations Framework Convention on Climate Change" (UNFCCC) defines climate change as "a change of climate which is attributed directly or indirectly to human activity which alters the composition of the global atmosphere and which is in addition to natural climate variability observed over a comparable time period."[1] Emphasizing the anthropogenic character of the phenomenon and separating it from natural climate fluctuation, this description helps one to grasp the background in which conflicts about climate change develop.

[1] United Nations Framework Convention on Climate Change 1992, art 1

Building upon the same, the "Task Force on Arbitration of Climate Change Related Problems" of the "International Chamber of Commerce" (ICC) has developed a workable definition of climate change conflicts/disputes (CCD), i.e., "any dispute arising out of or in relation to the effect of climate change and climate change policy, the United Nations Framework Convention on Climate Change and the Paris Agreement."[2] Nevertheless, with the advent of technology and enhanced human knowledge, the definition of climate change keeps evolving. For example, the "Permanent Court of Arbitration" (PCA) has created optional guidelines for the arbitration of conflicts involving the environment, which, although not mainly targeted at climate change, offer a framework applicable to many climate-related disputes.[3]

Definitional uncertainties are challenging in practice, and particularly so in legal/regulatory frameworks, where, with any degree of ambiguities or unclear wording around a definition, uncertainty is created for stakeholders and enforcement agencies. For example, in the *Abengoa Green Bond Dispute (2021)*, arbitration was challenging to draw up due to a lack of clear environmental criteria for "green projects" causing disagreements over the allocation of funds, and compliance of the projects.[4] Another potent example could be in the

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2 ICC Commission on Arbitration and ADR Task Force on Arbitration of Climate Change Related Disputes, *Resolving Climate Change Related Disputes through Arbitration and ADR* (2019)

3 Permanent Court of Arbitration, *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment* (2001)

4 Climate Bonds Initiative, *Global State of the Market 2024* (Report, 31 May 2025) <https://www.climatebonds.net/data-insights/publications/global-state-market>

anti-trust law, where definitional ambiguities including terminology such as "market power" or "appreciable adverse effect on competition" may remain ambiguous, resulting in different results from different authorities and courts as we try to piece together a legally predictable response.[5] Some parties may breach rules without intending to do so, or at a minimum result in being exposed to costly litigation to establish what they are responsible for. In a similar vein, definitional ambiguities and unclear wording are impeding effective regulation and policy making. On the one hand, enforcement authorities may be reluctant to have confidence in a uniform basis enforcing laws. On the other, firms may have difficulties demonstrating compliance, especially when cross-border, as jurisdictions have different definitions or meanings of many regulatory concepts. These challenges illustrate the need for greater clarity in drafting legal instruments, including the ability to remember context, and follow through by *interpreting the legislation, with the aim to do so uniformly and then apply the regulation consistently and fairly*. Hence, this paper emphasises the need for tailored arbitration approaches to effectively manage the multifaceted nature of climate change disputes while addressing the inherent challenges that arise within contemporary times.

It advances three main arguments: (1) traditional mechanisms are insufficiently equipped to handle the unique complexity of climate change disputes necessitating specialized ADR approaches; (2)

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5 Michal S Gal, 'Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions' (2009) 33(1) Fordham International Law Journal 1

integration of green finance instruments requires careful consideration of verification and compliance frameworks; and (3) developing nations like India require a balanced approach that harmonizes international obligations with domestic environmental priorities. Having the basic framework for comprehending climate change conflicts established, it is now imperative to carefully examine their several types and unique characteristics to improve knowledge of the degree of these conflicts.

2. CLIMATE DISPUTE TAXONOMY AND CHARACTERISTICS

2.1 Types of Climate Change Disputes

The ICC Task Force report[6] provides a valuable framework for categorizing climate change disputes, identifying three main types:

1. Submission Agreements:

They are agreements or clauses within contracts that stipulate arbitration as the chosen method for resolving disputes should they arise, reflecting a proactive approach to dispute resolution in climate-related matters. Agreeing in advance to settle such conflicts by arbitration, they guarantee parties access to a flexible, expertise-driven process fit for the complicated and frequently technical character of climate change challenges.[7]

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6 *'Resolving Climate Change Related Disputes through Arbitration and ADR'* (International Chamber of Commerce, 2019) <www.iccwbo.org/climate-change-disputes-report>

7 ibid para 2.6; Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (5th edn, Kluwer Law International 2016) ch 3

2. Contracts Not Specifically Related to Transactions, Adaptations, or Mitigations:

They include conflicts resulting from contracts not particularly relevant to transactions, adaptations, or mitigations but impacted by global warming or changes in climate-related legislation, acknowledging that a variety of commercial activities are affected by climate and related policy changes and the necessity of dispute resolution systems to be able to handle direct as well as indirect conflicts resulting from it.[8]

3. Specific Transaction, Adaptation, or Mitigation Contracts:

This category comprises disputes arising from specific transactions, adaptation, or mitigation contracts. These disputes stem from contracts explicitly formed to comply with the Paris Agreement or other climate change mitigation efforts. Such disputes often involve a complex web of stakeholders, including investors, industry bodies, states, funders, owners, and contractors.[9]

These categories are not mutually exclusive, and a single dispute may have elements that fall into multiple categories. For instance, a dispute over a renewable energy project might involve both specific climate mitigation contracts and broader issues related to

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8 ' *Resolving Climate Change Related Disputes through Arbitration and ADR'* (International Chamber of Commerce, 2019) para 2.5 <www.iccwbo.org/climate-change-disputes-report>

9 ibid para 2.4; Paris Agreement 2015, art 4(12)

changing environmental regulations. The ICC's categorization provides a valuable framework for understanding the diverse nature of climate change disputes and the various contexts in which arbitration may be applied.

Additionally, on the basis of parties and source of the climate-related disputes, the agreements can be further classified into the following classes:

A. International Climate Agreement Disputes: These disputes often revolve around the interpretation of treaty obligations, compliance with emissions reduction targets, and conflicts over climate finance mechanisms. The Paris Agreement, for instance, provides in Article 24 that the provisions of Article 14 of the UNFCCC regarding settlement of disputes shall apply, including requirements for arbitration and conciliation.[10]

B. Investor-State Disputes: These include claims arising from changes in climate policy affecting investments, disputes over renewable energy projects, and conflicts related to carbon credit schemes. The International Centre for Settlement of Investment Disputes (**ICSID**) has reported an increase in climate-related cases, particularly in the energy sector.[11]

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[10] Paris Agreement 2015, art 24

[11] International Centre for Settlement of Investment Disputes, *The ICSID Caseload – Statistics* (2021)

C. Corporate Climate Liability Disputes: Such disputes involve shareholder disputes over climate risk disclosure and supply chain conflicts related to emissions reduction commitments. As corporations face increasing pressure to address climate risks and reduce emissions throughout their supply chains, disputes in this area are becoming more common.[12]

D. Insurance and Climate Risk Disputes: These include disputes over coverage for climate-related events and conflicts regarding climate risk assessment and pricing. The insurance sector is particularly vulnerable to climate change impacts, leading to an increase in climate-related disputes.[13]

E. Environmental Damage and Restoration Disputes: These refer to the conflicts that arise over responsibility for environmental remediation and disagreements over the implementation of adaptation measures. Such disputes often involve complex scientific and technical issues, making them well-suited for arbitration with expert arbitrators.[14]

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12 J Setzer and R Byrnes, *Global Trends in Climate Change Litigation: 2021 Snapshot* (Grantham Research Institute on Climate Change and Environment and Centre for Climate Change Economics and Policy, LSE 2021)

13 Geneva Association, *Climate Change Litigation: Insights into the Evolving Global Landscape* (2021)

14 J Levine, 'Climate Change Disputes: The PCA's New Arbitration Rules' in S Muller and others (eds), *The Law of the Future and the Future of Law: Volume II* (Torkel Opsahl Academic EPublisher 2012)

2.2 Features of Climate Change Disputes[15]

Climate change disputes possess several unique features that distinguish them from other types of commercial or environmental disputes. Understanding these features is crucial for effectively managing and resolving such disputes through arbitration or other means.

A. One crucial aspect is the technical complexity of conflicts related to climate change. As pointed out by Elena P. Ermakova, such conflicts often call for recognizing and handling complex technical and scientific issues, necessitating the participation of professionals with pertinent knowledge to guarantee competence alignment when resolving disputes.[16] For instance, a disagreement on the effectiveness of a carbon offset project could call for the opinions of carbon market analysts, forestry professionals, and climate scientists, allowing arbitrators with pertinent technical skills to acquaint themselves with the technical know-how and use expert witnesses flexibly, making arbitration well-suited to manage such complexities.

The case of *Vattenfall AB and Others v. Federal Republic of Germany*[17] provides a concrete and substantial illustration of the

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15 EP Ermakova, 'Specifics of Resolving Disputes in the Field of Climate Protection by State Courts and Arbitration' (2022) 26 *RUDN Journal of Law* 192

16 ibid

17 *Vattenfall AB v Federal Republic of Germany* (ICSID Case NoARB/12/12) ICSID Case Database <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/12/12>

complications that arise in arbitrations where expert scientific evidence is required. Vattenfall, a Swedish energy company, filed a claim pursuant to the Energy Charter Treaty against Germany, following the abrupt nuclear phase-out policy that Germany enacted after the 2011 Fukushima disaster. The investors argued that Germany's decision to hasten the exit from nuclear power along with their pre-Fukushima license extensions, violated their legitimate expectations and amounted to indirect expropriation and violated fair and equitable treatment. The core of the matter was whether the shift in policy direction, which was based on environmental and public safety concerns, was based on proper legal and scientific justification.

The case included substantial expert evidence and in particular, testimony related to nuclear plant safety, assessments of radiation risk and environmental modelling. Germany argued that its change of policy was a precautionary shift, based on risk analyses that had evolved post Fukushima; Vattenfall argued that new data indicated that its plants conformed to the highest safety standards and did not present any additional risk.[18] The Tribunal had to consider scientific

[18] *Vattenfall AB, Vattenfall GmbH, Vattenfall Europe Nuclear Energy GmbH, Kernkraftwerk Krümmel GmbH & Co oHG and Kernkraftwerk Brunsbüttel GmbH & Co oHG (Claimants) v Federal Republic of Germany* (ICSID Case NoARB/12/12) in International Law Reports (Cambridge University Press) <https://www.cambridge.org/core/journals/international-law-reports/article/abs/vattenfall-ab-vattenfall-gmbh-vattenfall-europe-nuclear-energy-gmbh-kernkraftwerk-krummel-gmbh-and-co-ohg-and-kernkraftwerk-

uncertainty concerning nuclear risks, and whether a change in regulation was unwarranted and how to value lost return on the assets. The parties ultimately settled in 2021, with Germany paying around €1.4 billion in the settlement.

B. Another important aspect is the need for quick resolution of conflicts. Climate change conflicts generally demand quick settlement of their wide-ranging and immediate effects on international ecology and economy. Arbitration's case management tools—fast-track procedures and emergency actions, among others—allow one to meet this need. For cases of great urgency, for instance, the Environmental Rules of the Permanent Court of Arbitration offer the option for accelerated procedures.[19]

C. The interaction of several environmental, regional, and global treaties and agreements also characterizes the nature of climate change disputes. Often linked by a convoluted web of legal responsibilities resulting from many sources such as treaties, agreements, and customary international laws, among others, parties in these conflicts are Arbitrators using this tool must negotiate and decipher changing national and global climate change policies. Arbitration's flexibility lets one analyze these several legal

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brunsbuttel-gmbh-and-co-ohg-the-claimants-v-federal-republic-of-germany/B5CE155E7BB1692E965AAFE1A716D918>

[19] Permanent Court of Arbitration, *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment* (2001)

systems in a way that would be difficult in national court systems.

D. Another critical aspect of climate change conflicts is the issue of public interest. In many cases, these conflicts call for considering public accessibility to necessary submissions and rewards. This factor results from the public demand for climate-related decision-making and the comprehensive effects of climate change on society. Although arbitration usually provides anonymity, more and more people understand that openness is necessary in climate-related conflicts. Specific arbitration procedures, such as the UNCITRAL procedures on Transparency in Treaty-based Investor-State Arbitration, offer means for more openness that can be modified for disputes arising from climate change.[20]

E. Finally, given different points of view to enable overall results, climate change conflicts often allow for third-party intervention with consent. This function acknowledges the global effects of climate change and the interdependence of climate-related problems. In arbitration, this might be handled by means of amicus curiae filings or the grouping of pertinent cases. In investor-state arbitrations involving climate policies, for instance, environmental groups or impacted communities could be allowed to participate, guaranteeing a more thorough examination of the relevant issues.

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[20] UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (2014)

These features collectively underscore the unique nature of climate change disputes and highlight the potential advantages of arbitration and alternate dispute resolution mechanisms in addressing them, which allows for tailored approaches that can accommodate the technical complexity, urgency, legal plurality, public interest, and multi-stakeholder nature of climate change disputes. Though understanding the nature and causes of arguments on climate change is crucial, equally important is examining the financial structures that support climate action, a vital instrument in climate finance of which are green bonds.

2. GREEN BONDS IN CLIMATE FINANCE

Climate finance refers to the activity of funding the many means of mitigating or adapting to climate change which are being taken by low and middle countries across the globe. One of the most pertinent efforts from the cluster available is transitioning to a low-carbon economy.[21] It primarily includes investments which aim at reducing greenhouse gas emission rates and enhances resilience to climate change. Recently, green bonds have emerged as a tool to enable both public and private entities to raise funds for environment related projects. They are essentially debt instruments earmarked for financing projects.[22]

This funding can come from various sources which includes – Public Finance (governmental funding, often supported by

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21 United Nations Framework Convention on Climate Change, 'Introduction to Climate Finance' <https://unfccc.int/topics/introduction-to-climate-finance>

22 GIZ, 'Green Municipal Bonds Report' (*National Institute of Urban Affairs*, 2021) <https://niua.in/csc/assets/pdf/RepositoryData/UP_Green_Cover/GIZ_Green_Municipal_Bonds_eReport.pdf>

international agreements), Private Investment (which comes from corporations and individual investors) and Multilateral Development Banks (which is supported for other institutions).[23] The importance of climate finance is further strengthened by international commitments, most pertinent of which is the Paris Agreement which aims to mobilise significant financial and sustainable resources to limit global warming to less than two-degree Celsius.[24]

The concerns in this arena primarily revolve around the verification of "green credentials", disputes over environmental impact measurements, potential green washing allegations, and breaches of green covenants.[25] In order to tackle these challenges through ADR mechanisms, there is a requirement of *specialised arbitration clauses*, meaning thereby that environmental experts must be included while framing of arbitration clauses. Furthermore, clear cut statistics and matrix must be measured for environmental compliance and specific reporting measures. In addition to this, the procedural framework must include expedited processes which include urgent interim measures intended to prevent immediate harm to the environment during the continuance of dispute resolution process.

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[23] United Nations, 'Climate Finance' <https://www.un.org/en/climatechange/raising-ambition/climate-finance>

[24] UNFCCC, 'Key Aspects of the Paris Agreement' <https://unfccc.int/most-requested/key-aspects-of-the-paris-agreement>

[25] Shreyansh Rathi, 'Cracking the ESG Conundrum: Is Arbitration the Key to Resolution of ESG Disputes?' (*Mondaq*, 7 February 2023) <www.mondaq.com/india/arbitration-dispute-resolution/1375770/cracking-the-esg-conundrum-is-arbitration-the-key-to-resolution-of-esg-disputes>

The vertical of institutional framework can be further strengthened by development of specialised rules and procedures to govern the arbitration process.[26] Furthermore, panels of environmental experts must be maintained to strengthen the aforementioned procedure and additionally provide guidance on environmental compliance standards and training to arbitrators in these matters. Prevention strategies like regular monitoring, structured dialogue procedures are essential for effective resolution of these disputes. Although green bonds and climate financing systems provide interesting answers, their application with ADR raises some important questions that need careful study and resolution.

3. PROCEDURAL AND SUBSTANTIVE CHALLENGES TO ADR

Granting ADR mechanisms, particularly arbitration, offer potential benefits for resolving climate change disputes, they face substantial challenges and limitations. Some of the most imminent and urgent of which have been discussed in detail below:

3.1 Publishing of Awards

Combining the traditional confidentiality of arbitration and other ADR procedures with the demand for transparency and accountability in matters consisting of great public prominence posits one of the most challenging problems in opting for alternate redressal mechanisms to resolve climate change disputes. Consequently, the "International Chamber of Commerce" (ICC)

[26] GIZ, 'Green Municipal Bonds Report' (*National Institute of Urban Affairs*, 2021) <https://niua.in/csc/assets/pdf/RepositoryData/UP_Green_Cover/GIZ_Green_Municipal_Bonds_eReport.pdf>

addressed this default by instituting a policy of publicizing arbitral findings, with the exception of parties objecting to such publication.[27]

Subsequently, the practice of publicizing eminent rewards fulfilled several significant functions such as *firstly*, by allowing public and stakeholder access to results, the practice raises the legitimacy and accountability of the arbitration procedure, and *secondly*, by letting academics, lawyers, and legislators examine common concerns, techniques, and findings of precedents, particularly valuable given the rapid evolution of climate law and regulation, it helps in the contribution to the jurisprudence of this area of law.[28]

Nevertheless, the publication of awards is not devoid of its lacunas. Transparency has to be balanced with the safeguarding of private business or technical knowledge. Arbitral institutions and tribunals have to find a careful equilibrium that can call for anonymizing or redacting particular information. Moreover, the possibility of publishing could impact the behaviour of participants during procedures, thereby influencing the honesty of negotiations or their inclination to focus on particular problems. For instance, UNCITRAL's Transparency Rules have been increasingly invoked in investor-state dispute settlement, particularly through the Mauritius Convention on Transparency, 2014 in order to facilitate

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27 International Chamber of Commerce, *Report on Resolving Climate Change Related Disputes through Arbitration and ADR* (2019)

28 ibid

accountability in the process.[29] A landmark example is *Eli Lilly v. Canada*, where all documents of the tribunal and hearings were made publicly available, bringing legitimacy and public confidence to the settlement process.[30] Nonetheless, the track-record of UNCITRAL's Transparency Rules is mixed because uptake of the Mauritius Convention remains minimal *(recently only around 10 ratifications as of 2024)*, and many of the older treaties are pre-Mauritius Convention and thereby are exempted.[31] States and investors also typically will opt out of transparency in an ad-hoc arbitration context. Transparency has improved procedural fairness and stakeholder access. However, ongoing resistance from states and investor concerns regarding confidentiality continue to present barriers to full implementation.

3.2 Defining the Scope of Arbitrable Climate Disputes

Applying ADR to climate change conflicts is also hampered in significant part by the absence of a universally acceptable definition of what qualifies as a "climate change dispute." Though critical international agreements such as the

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[29] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 10 December 2014) (Mauritius Convention on Transparency) <https://uncitral.un.org/en/texts/arbitration/conventions/transparency>

[30] *Eli Lilly and Company v The Government of Canada* (UNCITRAL, Case No UNCT/14/2) italaw <https://www.italaw.com/cases/1625>

[31] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 10 December 2014) (Mauritius Convention on Transparency) <https://uncitral.un.org/en/texts/arbitration/conventions/transparency>

Kyoto Protocol,[32] the UNFCCC, and the Paris Agreement[33] abound, there is still an apparent dearth of exact definitions for such kinds of disputes. This uncertainty permeates many areas, including infrastructure, energy and commercial contracts, making it challenging to spot and categorize conflicts connected to climate change.

Given its intrinsic public policy consequences, the absence of an acknowledged framework for addressing climate change conflicts begs questions regarding their arbitrability. Unlike other forms of conflicts that have progressively acquired importance for arbitration, the lack of a clear definition of climate change disputes makes their acceptance in the arbitration field difficult. The changing nature of climate research and politics aggravates this definitional challenge, requiring the legal systems to evolve to address the challenges effectively and continuously.

3.3 Complexity in Determining Applicable Law

Additionally, climate change disputes often transcend national borders owing to their widespread impact, thereby making it challenging to determine a specific national jurisdiction to proceed with arbitration or other ADR procedures. Unlike conventional business conflicts, climate-related disputes are multi-jurisdictional, each with its own environmental laws and climate

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[32] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162

[33] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107

policy framework, posing a significant challenge in ascertaining the most appropriate legal framework for resolving such conflicts.[34]

In line with the disparities in national legislation owing to their socio-economic and legal systems, parties must negotiate conflicting legal systems and balance the effects of several government actions, as consistent with Elena P. Ermakova's observation that "determining applicable law complicates arbitration in climate change disputes, especially in cases involving multiple jurisdictions,"[35] the lack of a unified international legal framework expressly addressing climate change arbitration adds, yet, another level of complexity.

3.4 Balancing Public Interest and Private Dispute Resolution

Issues of climate change necessarily involve public interests, which can run counter to the generally private character of arbitration. The global effects of climate change mean that the results of these conflicts often have far-reaching consequences outside of the immediate parties engaged, which begs questions about how best to balance the need for confidence and efficiency in arbitration with the greater public interest in environmental protection and climate action. This equilibrium is undermined when public policy is applied to many climate-related conflicts or when state institutions participate in their activities. Arbitrators

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34 Paris Agreement under the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) UN Doc FCCC/CP/2015/10/Add.1.

35 EP Ermakova, 'Specifics of Resolving Disputes in the Field of Climate Protection by State Courts and Arbitration' (2022) 26 *RUDN Journal of Law* 192

would have to balance public policy concerns related to climate change with the private contractual rights of individuals.

This balancing act calls for a thorough assessment of issues like the possible environmental effects of activities, the rights of impacted populations, and the main objectives of worldwide climate agreements. Acknowledging this issue, the Permanent Court of Arbitration (PCA) has also noted that as of July 2018, it was handling 17 cases related to environmental and energy topics under various types of agreements, including public-private partnerships.[36] These cases highlight the need for arbitration mechanisms that can effectively balance private contractual rights with broader public interest considerations.

3.5 Limited Role in Policy Formulation and Precedent-Setting

Unlike public court proceedings, arbitration usually has a limited influence on legal precedent-setting and policy shaping. In the framework of discussions on climate change, this restriction is particularly crucial since many conflicts act as an impetus for policy adjustments and precedent-setting.[37] Arbitration processes are private, and their lack of general publication limits their possible influence on more general policy development.

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[36] International Chamber of Commerce, 'Resolving Climate Change Related Disputes through Arbitration and ADR' (2019) 52

[37] F Caldas Veras, 'Commercial Arbitration and the Fight against Climate Change: What Role Can It Actually Play?' (*LSE Law Review Blog*, 5 March 2022) <https://blog.lselawreview.com/2022/03/05/commercial-arbitration-and-the-fight-against-climate-change-what-role-can-it-actually-play/>

Although the *Kishenganga Arbitration (Pakistan v. India, 2013)*; decision under the Indus Waters Treaty does not have precedential effect, it directed water-sharing practices in an important way. The Tribunal permitted India to divert the Kishenganga River for hydroelectric use, but required a minimum environmental flow of 9 cumecs to support ecosystems downstream in Pakistan. This was the first time that any legal body established a framework balancing development and environment.[38] While the decision was limited to the Indus Treaty, it had some influence on regulatory standards for promoting environmental flow and reinstated the role of legal instruments in managing transboundary water disputes. Environmental flow became an emerging policy norm not just for India and Pakistan, but also with relevant neighbouring countries like Nepal and Bangladesh who started to incorporate similar provisions into their negotiations. Overall, the Kishenganga decision signals a shifting momentum towards legally cooperative and ecologically conscious governance of water in South Asia, highlighting implications for broader climate governance.

Arbitration does not give the same incentives for claimants to follow these paths, while litigation offers the research of constitutional issues and policy formulation. Arbitral tribunals lack

[38] Natalie Klein, 'The Indus Waters Kishenganga Arbitration – Reviving the Indus Waters Treaty and Arbitration of Interstate Water Disputes' (*Kluwer Arbitration Blog*, 21 January 2014) <https://arbitrationblog.kluwerarbitration.com/2014/01/21/the-indus-waters-kishenganga-arbitration-reviving-the-indus-waters-treaty-and-arbitration-of-interstate-water-disputes/>

an explicit mandate to consider a more general constitutional concern on climate change. Moreover, arbitral decisions have little precedential value, especially in multinational environmental disputes, which limits their possible influence on policymaking and legal development in this vital sphere.

This limitation might make it difficult for an arbitration-based unified body of climate change legislation to be established. It also begs questions regarding the relevance of arbitration for disputes involving significant policy consequences or those that could gain from public review and discussion. Although, as observed by Felipe Caldas Veras, "climate change disputes often catalyse policy revision and precedent-setting, primarily through landmark court decisions," the inherent character of arbitration poses challenges in this regard.

3.6 Challenges in Involving Third Parties and Affected Communities

Third parties—primarily those directly impacted by repercussions of climate change—cause additional complexities in arbitration procedures. Although non-signatory parties may be able to join or submit under arbitration procedures, their practical application is still problematic, especially in relation to climate issues.[39] The ICC paper also notes this challenge and writes, "Participation of the international community can also help in

[39] SR Garimella, 'Environmental Dispute Resolution, ADR Methods and The PCA Arbitration Rules' (2016) *ILI Law Review* 201

delivering decisions that will be beneficial not just for the contracting parties, but also to the other countries in the world."[40]

Furthermore, third-party involvement brings complex legal and procedural issues, including public policy, relevant legislation, and the assent of major parties, which Arbitral tribunals must handle. Arbitration procedures create more significant challenges in serving the interests of non-signatory victims of climate change than litigation, in which courts might be more receptive to third-party claims. Fair and comprehensive findings depend on affected communities participating in climate-related arbitrations.

Such an inclusion would raise imminent questions about how to fairly represent different community interests, manage possible conflicts among community members, and ensure that community involvement does not overload or postpone the arbitration process. Lastly, the lack of technical and scientific complexity of many climate change disputes also hinders the active participation of impacted individuals. Therefore, one of the main challenges is making sure these parties have the tools and knowledge required to engage in the arbitration procedure properly.

Hence, as the field of climate change law continues to evolve, so too must the frameworks and practices for arbitrating related disputes. Only by confronting these challenges head-on can we hope

[40] International Chamber of Commerce, 'Resolving Climate Change Related Disputes through Arbitration and ADR' (2019) 31

to develop ADR mechanisms that are genuinely effective in addressing the complex and urgent issues posed by climate change. Consequently, in the Indian context, such limitations pose both unique obstacles and opportunities for development.

4. THE INDIAN JURISDICTIONAL PERSPECTIVE

The Indian strategy for addressing climate change disputes has evolved drastically. However, awareness about the complex interaction between environmental preservation, sustainable development, and international obligations continues to develop. Recently, in a landmark judgement by the full bench of the Hon'ble Supreme Court in the case of *M K Ranjitsinh & Ors. v. Union of India & Ors.*,[41] the Apex Court recognized the right to a healthy environment and the right to be free from the adverse effects of climate change, underlining the critical need of striking a balance between conservation efforts and the need of tackling climate change. The Court articulated a nuanced perspective on this delicate balance:

> *"60. While balancing two equally crucial goals - the conservation of the GIB on one hand, with the conservation of the environment as a whole on the other hand - it is necessary to adopt a holistic approach which does not sacrifice either of the two goals at the altar of the other. The delicate balance between the two aims must not be disturbed. Rather, care must be taken by all actors, including the state and the courts to ensure that both goals are met without compromising on either…"*[42]

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41 *M K Ranjitsinh v Union of India* [2024] INSC 280

42 ibid [60]

Such a perspective exhibits a sophisticated awareness of environmental interconnectedness and the need for balance, demonstrating India's need to honour her international duties while tackling home ecological challenges. Specialized environmental tribunals and conventional litigation suits primarily define India's present dispute resolution system for conflicts related to climate change. Established under the "National Green Tribunal Act, 2010," (NGT Act), the "National Green Tribunal" (NGT) marks a significant first towards specialized adjudication of environmental conflicts.[43] However, this approach is not very suited for the complicated and pressing character of climate change issues.

The NGT's narrow jurisdiction—which spans only seven particular laws—is one of the main challenges which actively reduces the tribunal's authority to handle environmental problems outside the designated areas.[44] Given the dynamic character of climate change issues, which often challenge accepted legal classifications, such a restriction is highly problematic. The NGT's restrictive jurisdiction does not cover the more significant climate change concerns that might extend beyond the established statutory provisions, therefore creating a substantial void in addressing overall environmental challenges. A prominent climate dispute that's presently not encompassed by the NGT relates to ***transnational green finance obligations*** like India's obligations for climate linked sovereign bonds or defaults on private green bonds. For instance, where an Indian

[43] National Green Tribunal Act 2010 (India)

[44] SK Patra and VV Krishna, 'National Green Tribunal and Environmental Justice in India' (2015) 44(4) *Indian Journal of Geo-Marine Sciences* 445

company defaults on green bonds that were issued to fund renewable energy but mis-capitalises the funds and gives rise to aggrieved foreign investors; there is no recourse at the NGT as it does not have jurisdiction for cross border contractual or financial disputes.

Moreover, the NGT lacks the power of an administrative or constitutional body, therefore restricting its capacity for judicial review[45] and reducing its capacity to address climate-related challenges effectively. The NGT's incapacity to seek judicial review further limits its capacity to evaluate government policies or actions pertaining to climate change. Another critical issue is the composition of NGT benches, which mainly consist of people with legal backgrounds that lack diversity in expertise,[46] thereby compromising the tribunal's capacity to grasp the multifarious nature of climate change conflicts, which often require multidisciplinary knowledge, including scientific, economic, and social perspectives.

Furthermore, the inadequate membership strength of the NGT, operating with fewer benches than mandated by the NGT Act, impairs its ability to handle the volume and complexity of environmental disputes effectively, which run with benches less than what is mandated by the NGT Act.[47] The shortage of personnel decelerates efficient case resolution, which can be particularly troublesome in time-sensitive climate change instances. Under these limitations, ADR mechanisms, including arbitration—which handles

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45 V Kumar, 'Condemnation and Loopholes of National Green Tribunal Act 2010' (2020) 2 *Law Audientia Journal*

46 ibid

47 ibid

climate change issues more efficiently—are becoming progressively prominent.

Arbitration has several benefits that make it perfect for handling the complexity of environmental conflicts. Its natural efficiency and speed can be crucial in avoiding ecological issues, which are usually exacerbated by delays in litigation.[48] Based on the UNCITRAL Model of International Commercial Arbitration of 1985[49] and the UNCITRAL Arbitration Rules of 1976,[50] the Indian Arbitration and Conciliation Act of 1996 creates a flexible framework for dispute resolution that can be adapted to resolve environmental disputes[51] and enable contesting parties to use a private adjudication system which would serve as a consensual and efficient mechanism for reaching settlements without depending on the conventional legal system.[52]

A notable example demonstrating the potential of arbitration in resolving complex environmental disputes is the Indus Waters Kishenganga Arbitration, 2010. Concluded in December 2013, this case was a turning point in international environmental conflict resolution by arbitration, most famously in terms of transboundary

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48 SR Garimella, 'Environmental Dispute Resolution, ADR Methods and The PCA Arbitration Rules' (2016) *ILI Law Review* 201

49 UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985) UN Doc A/40/17, Annex I

50 UNCITRAL Arbitration Rules (adopted 15 December 1976)

51 Arbitration and Conciliation Act 1996 (India)

52 UNCITRAL Model Law on International Commercial Arbitration (adopted 21 June 1985) UN Doc A/40/17, Annex I; UNCITRAL Arbitration Rules (adopted 15 December 1976)

water resource management in view of climate change issues.[53] The argument focused on Pakistan's protest of India's development of the Kishenganga/Neelum River Hydroelectric Project (KHEP) in Kashmir, claiming that this violated the 1960 Indus Waters Treaty.[54] This case is noteworthy since it makes use of the arbitration system provided in the Treaty, therefore launching the official arbitration process for a disagreement between India and Pakistan under this agreement.[55]

The Court of Arbitration's decision in this case showcased the effectiveness of arbitration in balancing competing interests while upholding principles of sustainability and cooperation. Under strict guidelines to safeguard Pakistan's rights under the Treaty, the Court let India construct the KHEP for power generation,[56] including the determination of a minimum flow rate in the Kishenganga to lessen the detrimental effect on Pakistan's agricultural and hydroelectric requirements.[57] The Kishenganga Arbitration emphasizes how, by balancing conflicting interests and thereby preserving sustainability and cooperative values, arbitration may be used to settle complex ecological problems across countries. Particularly in cases involving transboundary resources and several stakeholders, it creates a

53 *Indus Waters Kishenganga Arbitration* (Pakistan v India) (Final Award) [2013] PCA
54 Indus Waters Treaty (Pakistan-India) (adopted 19 September 1960) 12 UST 881, TIAS No 5200
55 *Indus Waters Kishenganga Arbitration* (Pakistan v India) (Final Award) [2013] PCA, pt IA
56 ibid [109]
57 ibid [112], [116]

precedent for using arbitration to address global climate change challenges.[58]

5. WAY FORWARD

Therefore, even if India's present systems of conflict resolution for climate change concerns have significant restrictions, the possibility of arbitration as a substitute or complementing tool is becoming more and more acknowledged. The Kishenganga case is a striking illustration of how arbitration can efficiently handle complex environmental problems and provides ideas that might be used in Indian home climate change concerns. While embracing arbitration could provide a more flexible, efficient, and specialized approach to resolving environmental conflicts in India, simultaneously meeting the nation's international obligations and domestic ecological goals, climate change presents hitherto unheard-of challenges.

Climate finance plays a crucial role in global climate change mitigation, particularly in transitioning to low-carbon economies. Green bonds have emerged as key financial instruments for environmental projects, drawing funding from public, private and multilateral sources. However, challenges like verifying green credentials and greenwashing concerns necessitate specialized arbitration mechanisms, including environmental expert panels, clear compliance metrics, and expedited procedures for dispute resolution.

An interesting arbitration case surfaced when investors alleged that a Nordic renewable energy company had conducted greenwashing

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[58] ibid [119]

with the issuance of green bonds to fund 'sustainable biomass projects'. The investors claimed that the company had misrepresented the environmental effects of its projects, especially the carbon neutrality of biomass, in breach of the green bond framework and standards for Environmental, Social and Governance **(**ESG**)** disclosure.[59]

The case was referred to an institutional arbitration tribunal under the auspices of the Stockholm Chamber of Commerce (SCC) Rules, 2023.[60] The tribunal's arbitration procedure called for detailed disclosure, the appointment of environmental finance experts, and drawing together the Green Bond Principles to assess the issuer's compliance. One of the interesting procedural aspects was the tribunal's order for expert testimony on carbon accounting techniques.[61] This arbitration case demonstrated how arbitral forums are going to increasingly need to evaluate and adjudicate technical sustainability claims whilst processing ESG disputes with confidentiality, but according to an established and sanctioned arbitration process that allows the parties autonomy and enforceability.

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59 Irene A Gjengedal and others, 'Green Bonds and Sustainable Business Models in Nordic Energy Companies: Overcoming Internal Barriers' (2023) 7 Energy and Climate Change 100096 <https://www.sciencedirect.com/science/article/pii/S2666049023000336>

60 SCC Arbitration Institute, *SCC Arbitration Rules 2023* (adopted by the Stockholm Chamber of Commerce, in force 1 January 2023) <https://sccarbitrationinstitute.se/wp-content/uploads/2024/12/SCC_Arbitration_Rules_2023_English.pdf>

61 ibid

In India's shifting landscape of climate change litigation and dispute resolution, there is a growing recognition of the importance of imaginative, effective, and specialist methods for dealing with these problematic issues. Arbitration's role in climate change issues is likely to increase as India negotiates the challenges of sustainable development and environmental preservation since it provides an excellent approach to balance multiple interests and obtain meaningful answers in this critical subject.

BREAKING THE CLIMATE DEADLOCK- REFORMING ISDS TO END CORPORATE IMPUNITY AND RESTORE SOVEREIGN ENVIRONMENTAL JUSTICE

*Anubhuti Raje**

Abstract

The Investor-State Dispute Settlement system, originally intended to protect foreign investors from unfair treatment by states, has increasingly been used by corporations to challenge sovereign environmental policies, forcing governments to pay significant compensation for enforcing climate laws. This creates a regulatory paradox, where states that implement sustainability measures are penalized, discouraging further climate action. This paper critically examines ISDS as a barrier to climate governance. Furthermore, it highlights how broad interpretations of Fair and Equitable Treatment clauses and indirect expropriation claims enable corporations to undermine environmental policies, placing investor rights above public interest regulations. The result is a 'regulatory chill', particularly in the Global South, where states hesitate to enforce climate laws for fear of arbitration costs and financial liabilities. To counteract this, the paper proposes the Constitutionally Integrated Investment Framework, advocating for legal reforms that prioritize climate sovereignty clauses, human rights-based investment tribunals, and public interest arbitration panels. These measures aim to ensure

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that investment law does not obstruct climate action but instead aligns with sustainability goals. Reforming ISDS is critical to preventing corporate interests from obstructing sovereign environmental governance. Without significant changes, investment treaties will continue to impede climate policies, ultimately threatening long-term sustainability and global climate resilience. This paper adopts a hybridized methodological approach to elucidate the evolving interface between international investment law and climate governance.

Keywords: Investor-State Dispute Settlement (ISDS), Regulatory Chill, Climate Sovereignty, Environmental Necessity Doctrine, Green ISDS.

1. INTRODUCTION

The Anthropocene, an epoch defined by the unprecedented disruption by humans of the ecological balance of the Earth demands a fundamental re-evaluation of global legal regimes governing trade, investment, and environmental policy.[1] The tensions between these regimes are most evident in cases pertaining to Investor-State Dispute Settlement [**"ISDS"**] system, which was originally conceived for protecting foreign investors from arbitrary state acts but is now hidden behind the shield cynically waged against measures to address climate change.[2] While originally intended for the promotion of investment stability, ISDS has evolved into a mechanism enabling

1 Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford Univ. Press 2007).

2 M Sornarajah, *The International Law on Foreign Investment* 98–102 (Cambridge Univ. Press, 4th ed. 2017).

corporations to challenge environmental regulations, often securing billions in compensation for measures essential to global sustainability.[3] This paradox where states are penalized for enacting climate policies while corporations' profit from maintaining polluting industries raises profound concerns about the incompatibility of investment law alongside climate governance.[4]

The escalation of ISDS claims targeting climate policies underscores this contradiction, exposing the deep-seated conflict between investment protections and sovereign regulatory autonomy in advancing sustainability initiatives. Governments pursuing fossil fuel phase-outs, incentivizing renewable energy, and reinforcing environmental safeguards have found themselves subjected to ISDS litigation, particularly under Fair and Equitable Treatment ["FET"] clauses and indirect expropriation claims, effectively criminalizing legitimate public-interest regulations.[5] Cases such as *Vattenfall v. Germany* and *Rockhopper v. Italy* accentuate how ISDS has become a corporate instrument for resisting state-led environmental policies like Germany was forced to settle for €1.4 billion, similarly Italy to pay €190 million for enacting offshore oil drilling bans.[6] Such cases exemplify

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3 Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* 238–41 (Cambridge Univ. Press 2013).

4 Gus Van Harten, 'Origins of ISDS Treaties' in Kate Miles (ed), *The Trouble with Foreign Investment Protection* (Oxford University Press 2020) 17.

5 Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 145–151.

6 United Nations Conference on Trade and Development, *World Investment Report 2020: International Production Beyond the Pandemic* (UNCTAD UNCTAD/WIR/2020, 2020) 108–10 <https://unctad.org/system/files/official-document/wir2020_en.pdf> accessed 13 March 2025.

how investment arbitration rewards corporate profit expectations over climate imperatives, reinforcing the urgent need for systemic legal reform.[7]

1.1 The Evolution of ISDS- From Investment Protection to Climate Obstruction

Initially confined to expropriation disputes, ISDS expanded under Bilateral Investment Treaties ["BITs"], Free Trade Agreements ["FTAs"] and the Energy Charter Treaty ["ECT"], enabling corporations to challenge regulatory policies affecting their profits.[8] This expansion created a legal order detached from constitutional and environmental obligations, fostering 'regulatory chill' as states avoid climate policies fearing costly arbitration.[9]

A particularly illustrative example is *RWE v. Netherlands* and *Uniper v. Netherlands*, in which energy companies initiated ISDS claims against the Dutch government for phasing out coal-fired power plants as part of its carbon neutrality commitments.[10] These cases relied on broad FET interpretations, arguing that climate regulations breached

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7 *Vattenfall AB and others v Federal Republic of Germany* (ICSID Case No ARB/12/12); *Rockhopper Exploration Plc v Italian Republic* (ICSID Case No ARB/17/14).

8 United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development* (2015); Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95, art 10; Susan D Franck, 'Development and Outcomes of Investment Arbitration' (2009) 50 *Harvard International Law Journal* 435.

9 Matthew Rimmer, 'The Chilling Effect: Investor–State Dispute Settlement, Graphic Health Warnings, and the Trans-Pacific Partnership' (2018) 7(1) *Victoria University Law and Justice Journal* 76, 92.

10 ICSID Case No ARB/21/4; ICSID Case No ARB/21/22; European Commission, *Legal Analysis of Dutch Coal Phaseout and Investment Arbitration* (2021).

corporate 'legitimate expectations',[11] demonstrating how ISDS is leveraged to extract compensation[12] from states for aligning with international climate commitments.[13] The financial ramifications are severe as globally, ISDS claims challenging environmental regulations have exceeded $340 billion, diverting essential public funds away from sustainability initiatives.[14]

1.2. The 'Right to Pollute' and the Undermining of Sovereignty

Broad interpretations of the FET clauses create a de facto 'Right to Pollute', which allows corporations to demand compensation for environmental laws, undermining democratic governance.[15] The implications of this dynamic transcend economic concerns as they pose a direct challenge to democratic governance, as ISDS tribunals operate beyond national legal systems, undermining sovereign authority over environmental policymaking.[16]

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11 United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II (United Nations 2012); Organisation for Economic Co-operation and Development, *Interpretation of the FET Standard under International Investment Law*, Working Papers on International Investment (OECD 2004).

12 International Institute for Sustainable Development, *Climate Change and Investment Treaties: Mapping the Role of ISDS in Climate Action* (2021); Columbia Center on Sustainable Investment, *Aligning Investment Treaties with the Paris Agreement* (2022).

13 *RWE AG v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4; *Uniper SE v. Kingdom of the Netherlands, ICSID Case No. ARB/21/22.*

14 OECD, 'Investment Treaties and Climate Change' (2022).

15 Kyla Tienhaara, 'Regulatory Chill in a Warming World' (2018) 7(2) *Transnational Environmental Law* 229, 231.

16 UNCTAD, World Investment Report (2022); IISD, The Cost of Investment Arbitration to Climate Policy (2021); CCSI (2022).

1.3. Green ISDS- A New Legal Framework

UNCITRAL's reform efforts, though limiting investor claims, fail to resolve ISDS's structural conflict with climate governance.[17] While some scholars advocate for environmental carve-outs in ISDS, others argue for its abolition, contending that it is fundamentally incompatible with sustainability imperatives.[18] This paper proposes for 'Green ISDS', a restructured arbitration system embedding climate justice in investment disputes, which has the following-

i. Environmental Arbitration Panels- ISDS tribunals must include mandatory climate law expertise, ensuring that sustainability considerations are integrated into investment dispute adjudication.

ii. Climate Sovereignty Overriding Clause- Ensuring that international environmental obligations take legal precedence over investor protections, thereby preventing corporations from initiating ISDS claims against climate regulations.

iii. Global Climate Investment Tribunal ["GCIT"]- Establishing a specialized adjudicatory body with binding jurisdiction over ISDS cases that intersect with environmental governance.

iv. Reinterpretation of FET Clauses- Affirming the sovereign prerogative of states to regulate in public interest,

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17 UNCITRAL Working Group III, 'Possible Reform of ISDS – Draft Provisions on Procedural and Cross-Cutting Issues' UN Doc A/CN.9/WG.III/WP.231 (46th session, Vienna, 9–13 October 2023).

18 Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, 'ISDS in the Global South: Balancing Development and Investor Protections' (IISD 2023).

preventing investor claims that undermine legitimate climate policies.

By integrating constitutional supremacy principles into ISDS, Green ISDS safeguards fundamental rights such as the right to a clean environment from being subordinated to corporate profit motives.[19] For investment arbitration to retain legitimacy, it must transcend its corporate-centric foundations and align with global sustainability imperatives.[20] This paper presents a legal framework that harmonizes investment protections with climate governance, ensuring that international trade and investment do not undermine planetary survival.

1.4 RESEARCH METHODOLOGY

This paper adopts a hybridized methodological approach to elucidate the evolving interface between international investment law and climate governance. Doctrinally, it undertakes a critical examination of treaties, arbitral decisions, and legal instruments that constitute the ISDS regime. Normatively, it advances reform-oriented proposals grounded in constitutional environmentalism, climate sovereignty, and human rights frameworks.[21] Comparatively, it analyses divergent state practices particularly those of the European Union, United States, India, South Africa, and Latin America to

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19 Public Citizen, *Extreme Investor Rights in Trade Agreements and How They Threaten the Environment* (2020).

20 UNCTAD, *Investment Dispute Settlement Navigator*, <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 13 March 2025.

21 *Neubauer and others v Germany* BVerfG 1 BvR 2656/18, Judgment of 24 March 2021.

develop the Constitutionally Integrated Investment Framework. Through this integrated methodology, the paper aims to construct a legally coherent and normatively principled framework that reconciles investment protections with the imperatives of ecological survival and regulatory sovereignty in the Anthropocene.

2. THE HISTORICAL EVOLUTION OF ISDS & ITS CONTEMPORARY IMPLICATIONS

2.1 The Bretton Woods System and the Origins of ISDS

ISDS emerged post-World War II to stabilize trade, with the 1944 Bretton Woods Conference establishing the IMF and World Bank.[22] During the 1950s, states began signing BITs primarily to shield foreign investors from state-led expropriation, particularly in newly independent post-colonial economies.[23] Established in 1965, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ["ICSID Convention"], provided for 'institutionalized arbitration' as a preferred method for resolving investment disputes under the auspices of the World Bank.[24]

ISDS initially addressed direct expropriation, focusing on investment security rather than regulatory policies.[25] However, by the

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22 Gus Van Harten, 'Origins of ISDS Treaties' in Kate Miles (ed), *The Trouble with Foreign Investment Protection* (OUP 2020) 17.

23 Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (CUP 2009).

24 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) (entered into force 14 October 1966) 575 UNTS 159.

25 Matthew Rimmer, 'The Chilling Effect: Investor–State Dispute Settlement, Graphic Health Warnings, and the Trans-Pacific Partnership' (2018) 7(1) *Victoria University Law and Justice Journal* 76, 92.

late 20th and early 21st centuries, the expansion of Multilateral Investment Treaties ["MITs"] and Free Trade Agreements ["FTAs"] significantly broadened the reach of ISDS.

2.2 The Expansion of ISDS- From Expropriation to Regulatory Disputes

The adoption of treaties such as North American Free Trade Agreement [**"NAFTA"**] and the ECT expanded ISDS, allowing investors to challenge state regulations impacting their profits, beyond just expropriation claims.[26] The broad and inconsistent interpretation of FET clauses has enabled investors to challenge environmental regulations by framing them as cases of 'indirect expropriation', thereby curtailing sovereign regulatory space.[27] Climate-related ISDS cases highlight how investment treaties restrict state sovereignty, with corporations suing governments for environmental regulations.[28]

Landmark ISDS Cases Challenging Climate Policies

i. Vattenfall v. Germany

In *Vattenfall v. Germany*, the Swedish energy giant Vattenfall launched an ISDS claim against Germany's stricter coal emission regulations, arguing that the policy undermined its expected investment returns.[29] The claim, filed under the ECT, resulted in

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26 OECD, *Investment Treaties and Climate Change* (OECD 2022).

27 Alessandra Arcuri, Kyla Tienhaara, and Lorenzo Pellegrini, 'Investment Law v Supply-Side Climate Policies: Insights from *Rockhopper v. Italy* and *Lone Pine v. Canada*' (2024) 24 *International Environmental Agreements* 193, 198.

28 Kyla Tienhaara, 'Regulatory Chill in a Warming World' (2018) 7(2) *Transnational Environmental Law* 229, 231.

29 *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12.

Germany settling the case for €1.4 billion, underscoring how investment tribunals have been used to financially penalize governments for enacting environmental protections.[30]

ii. Rockhopper v. Italy

In *Rockhopper v. Italy*, British oil company Rockhopper sued the Italian government, contending that its ban on offshore drilling violated investment protections, ultimately securing €190 million in compensation. The arbitration tribunal ruled in favour of Rockhopper, ordering Italy to compensate the company €190 million.[31] This case exemplifies how ISDS mechanisms disproportionately favour investor claims over environmental and public interest considerations.[32]

iii. RWE v. Netherlands, Uniper v. Netherlands

The state's attempt to phase out the coal-fired power plants resulted in multiple ISDS claims, wherein the claimants RWE and Uniper claimed the Netherlands' carbon neutrality policies breached ECT protections.[33]

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30 Tobias Stoll, 'Vattenfall v Germany and the Potential Consequences for Environmental Regulation' (2013) *Investment Treaty News* <https://www.iisd.org/itn/en/2013/06/24/vattenfall-v-germany/> accessed 13 March 2025.

31 *Rockhopper Exploration Plc, Rockhopper Italia SpA and Rockhopper Mediterranean Ltd v Italian Republic*, ICSID Case No. ARB/17/14.

32 Martins Paparinskis, *Rockhopper v Italy: The Energy Charter Treaty and Investment Arbitration*, *Investment Treaty News* (12 December 2022).

33 *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands*, ICSID Case No. ARB/21/4; *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV v Kingdom of the Netherlands*, ICSID Case No. ARB/21/22.

These cases demonstrate how fossil fuel corporations strategically employ ISDS to seek compensation from states implementing climate policies aligned with international obligations.[34]

2.3 ISDS and the Global South- Unequal Burdens

Developing nations bear a disproportionate burden under ISDS, as many have signed investment treaties that prioritize corporate interests over sovereign regulatory autonomy, leaving them vulnerable to costly arbitration claims.[35] ISDS claims divert funds from public services.[36]

iv. **Eco Oro v. Colombia**

In *Eco Oro v. Colombia*, the Colombian government was sued for prohibiting mining in the ecologically fragile páramo ecosystems, despite the regulation being necessary to protect biodiversity and water security. The tribunal nonetheless ruled in favour of the investor, forcing Colombia to pay substantial compensation.[37] Despite biodiversity concerns, Colombia was ordered to compensate the investor. This case exemplifies how ISDS undermines conservation policies in developing nations.[38].

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34 UNCTAD Investment Dispute Settlement Navigator, 'RWE v The Netherlands' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1145/rwe-v-netherlands> accessed 13 March 2025.

35 Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, *ISDS in the Global South: Balancing Development and Investor Protections* (IISD report, 2023)

36 UNCTAD, *Treaty-Based Investor–State Dispute Settlement Cases and Climate Action* (IIA Issues Note, Issue 4, UNCTAD, September 2022).

37 *Eco Oro Minerals Corp. v Republic of Colombia*, ICSID Case No. ARB/16/41.

38 'Majority in *Eco Oro v Colombia* Finds Violation of Minimum Standard of Treatment, Holds That a General Environmental Exception Does Not Preclude Obligation to Pay Compensation' *Investment Treaty News* (20 December 2021) <https://www.iisd.org/itn/en/2021/12/20/majority-in-eco-oro-v-colombia-

v. **Odyssey v. Mexico**

In *Odyssey v. Mexico*, a deep-sea mining firm successfully used ISDS to challenge Mexico's ban on seabed mining, despite the government's policy being designed to prevent marine ecosystem destruction. The tribunal's ruling overrode Mexico's environmental sovereignty, reinforcing ISDS's pro-investor bias.[39]

vi. **Tethyan Copper v. Pakistan (2017), Barrick Gold v. Papua New Guinea**

Extractive industries have increasingly relied on ISDS to challenge sovereign resource governance. In *Tethyan Copper v. Pakistan*, an ISDS tribunal ordered Pakistan to pay $5.8 billion after it revoked a mining license due to environmental and regulatory concerns.[40] Furthermore, *Barrick Gold v. Papua New Guinea* underscored financial risks of regulating extraction, as the state faced arbitration for denying a permit renewal.[41]

ISDS has eroded state sovereignty, enabling corporations to contest public interest regulations at an unprecedented scale.[42] Climate disputes highlight the urgent need for ISDS reform. The Global South faces disproportionate ISDS impacts, revealing investment framework

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finds-violation-of-minimum-standard-of-treatment-holds-that-a-general-environmental-exception-does-not-preclude-obligation-to-pay-compensation/> accessed 13 March 2025.

39 *Odyssey Marine Exploration, Inc. v United Mexican States*, ICSID Case No. ARB/17/6.

40 *Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1.

41 *Barrick (PD) Australia Pty Limited v Independent State of Papua New Guinea*, ICSID Case No. ARB/20/27.

42 Julia Dehm, 'Undermining the Energy Transition' *Verfassungsblog* (19 November 2023).

inequalities. Reforms, therefore, must prioritize sovereignty over corporate interests in climate governance.[43]

3. THE CLASH BETWEEN INVESTMENT TREATIES AND THE CLIMATE CRISIS

The clash between investment treaties and climate governance demands immediate legal reform. While states enact policies to mitigate climate change and transition toward sustainable energy, corporations exploit ISDS mechanisms to challenge these efforts, often securing substantial compensation for policies that limit fossil fuel extraction or enforce emission reduction targets.[44] This phenomenon, commonly referred to as 'regulatory chill,' deters states from adopting robust climate policies due to the looming threat of investor claims.[45] The 'Right to Pollute' paradox arises when investment treaties, meant to ensure economic stability, instead penalize states for enforcing climate commitments.[46]

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43 UNCITRAL Working Group III, *Possible Reform of ISDS – Draft Provisions on Procedural and Cross-Cutting Issues* (UNCITRAL Working Paper A/CN.9/WG.III/WP.231, 46th session, Vienna, 9–13 October 2023).

44 UNCTAD Investment Dispute Settlement Navigator, 'RWE v The Netherlands' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1145/rwe-v-netherlands> accessed 13 March 2025.

45 Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor–State Dispute Settlement' (2018) 7(2) Transnational Environmental Law 229, 231.

46 Matthew Rimmer, 'The Chilling Effect: Investor–State Dispute Settlement, Graphic Health Warnings, and the Trans-Pacific Partnership' (2018) 7(1) Victoria University Law and Justice Journal 76, 92.

3.1 The 'Right to Pollute' Paradox and the Rise of ISDS Climate Claims

ISDS allows corporations to challenge regulations solely based on their impact on projected profits. Broad investment protections enable corporations to mischaracterize climate policies as expropriation, compelling states to pay damages.[47] This legal strategy undermines state sovereignty in regulating environmental and public health policies.[48] The paradox is evident as states enforcing Paris Agreement commitments face ISDS penalties.[49]

The Greenland Uranium Mining Dispute epitomizes this systemic failure of ISDS. In 2021, the Greenlandic Government banned uranium mining due to environmental concerns, citing risks of radioactive contamination and long-term ecological harm.[50] Greenland Minerals Ltd. invoked ISDS, seeking $11 billion nearly four times Greenland's GDP for an alleged expropriation.[51] This case underscores the power imbalance in ISDS, where corporations demand compensation for state-led environmental protections. It

47 Flavia Marisi, *Rethinking Investor–State Arbitration* (Springer 2023) 36.

48 Gus Van Harten, 'Origins of ISDS Treaties' in *The Trouble with Foreign Investment Protection* (OUP 2020) 17.

49 Joshua Paine and Elizabeth Sheargold, 'A Climate Change Carve-Out for Investment Treaties' (2023) 36(2) Journal of International Economic Law 285.

50 LSE, 'What Is Climate Change Legislation?' (4 October 2022) <www.lse.ac.uk/granthaminstitute/explainers/what-is-climate-change-legislation/> accessed 13 March 2025..

51 UNCTAD Investment Dispute Settlement Navigator, 'Rockhopper v Italy' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/756/rockhopper-v-italy> accessed 13 March 2025.

questions whether tribunals should adjudicate disputes where states protect ecologically sensitive areas.[52]

3.2 The Chilling Effect of ISDS- Colombia's Oil and Gas Phase-Out

Colombia faces a similar threat, as ISDS claims jeopardize its transition away from fossil fuels. Aligning with net-zero goals, Colombia planned to phase out oil and gas exploration. However, multiple foreign energy firms-initiated arbitration proceedings, contending that these regulatory measures unlawfully constrained their commercial activities.[53] These claims, based on BITs with broad investor protections, restrict climate policies.[54] ISDS disproportionately affects Global South nations, draining resources from development and climate resilience.[55] Colombia must choose between compensating investors for untapped fossil fuel reserves or continuing extraction to evade ISDS claims. This illustrates how ISDS locks developing nations into fossil fuel dependence, deterring urgent climate action.[56]

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52 OECD, *Investment Treaties and Climate Change* (OECD report, 2022).

53 UNCITRAL Working Group III, *Possible Reform of ISDS* (UNCITRAL working paper, 2023).

54 European Parliament News, 'MEPs Consent to the EU Withdrawing from the Energy Charter Treaty' (2024) <https://www.europarl.europa.eu/news/en/press-room/20240419IPR20549/meps-consent-to-the-eu-withdrawing-from-the-energy-charter-treaty> accessed 13 March 2025.

55 UNCTAD Investment Dispute Settlement Navigator, 'Vattenfall v Germany' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1145/vattenfall-v-germany> accessed 13 March 2025.

56 Kyla Tienhaara and Lorenzo Cotula, *Raising the Cost of Climate Action? Investor–State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets* (International Institute for Environment and Development 2020).

The Netherlands' Legal Battle- When Climate Policy Becomes a Liability

The Netherlands offers a stark example of ISDS obstructing climate governance. Germany's *Uniper* and *RWE* swiftly invoked against coal phase-out policy of Netherlands.[57] The companies, invoking the ECT, argued that the closures devalued their coal investments and sought compensation for their projected losses.[58] In *RWE v. Netherlands*, the state faced ISDS claims for enforcing EU-mandated climate policies.[59] The Netherlands' ISDS battle has fuelled the EU's push to exit the ECT, citing its incompatibility with climate goals.[60] Several EU nations have formally withdrawn, acknowledging the ECT's obstruction of climate policies.[61] This case highlights the necessity of restructuring investment law to protect climate policies from ISDS claims.[62]

3.3 FET Clauses- A Tool for Corporate Litigation

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57 Claire Provost and Matt Kennard, 'The Obscure Legal System that Lets Corporations Sue Countries' *The Guardian* (10 June 2015) <https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid> accessed 13 March 2025.

58 OECD, *The Notion of 'Indirect Expropriation' in Investment Treaties Concluded by 88 Jurisdictions: A Large Sample Survey of Treaty Provisions* (OECD report, 19 October 2021) 4.

59 European Parliament, *EU Withdrawal from the Energy Charter Treaty* (December 2023) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754632/EPRS_BRI(2023)754632_EN.pdf> accessed 13 March 2025.

60 UNCTAD, *Treaty-Based Investor–State Dispute Settlement Cases and Climate Action* (IIA Issues Note, Issue 4, September 2022).

61 Nathalie Bernasconi-Osterwalder and Sarah Brewin, *Terminating a Bilateral Investment Treaty* (IISD Best Practices Series, March 2020).

62 OECD, '2022 Conference on Investment Treaties: Paris Agreement and Net Zero Alignment' <https://www.oecd.org/daf/inv/2022-conference-investment-treaties.htm> accessed 13 March 2025.

Expansive FET clauses empower corporations to challenge environmental regulations.[63] Initially intended to protect investors from arbitrary/ discriminatory state actions, FET clauses have evolved into a catch-all provision that shields investor expectations even when those expectations contradict national climate objectives.[64] Arbitration panels prioritize commercial interests over state regulatory power.[65]

Undefined FET standards allow corporations to challenge climate laws, worsening 'regulatory chill'.[66] The absence of ISDS appeals makes tribunal decisions final, even if biased.[67] As a result, states must weigh potential arbitration costs before enacting environmental policies, effectively ceding decision-making power to corporate interests.[68]

3.4 Towards a More Balanced Investment Framework

ISDS flaws in climate cases necessitate a rethinking of investment treaties. Greenland, Colombia, and the Netherlands

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63 Gus Van Harten, 'An ISDS Carve-Out to Support Action on Climate Change' (*Osgoode Hall Law School of York University Research Papers*, 2015) 1–2.

64 Thomas Muinzer (ed), *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation* (Hart Publishing 2020).

65 Watson Farley & Williams, 'ISDS and Climate Change – What Happens Next?' (22 December 2022) <https://www.wfw.com/articles/isds-and-climate-change-what-happens-next/> accessed 13 March 2025.

66 Matthew Levine, 'ICSID Tribunal Renders Interim Decision on Ecuador's Environmental Counterclaim in Long-Running Dispute' *Investment Treaty News* (26 November 2015) <https://www.iisd.org/itn/en/2015/11/26/awards-and-decisions-21/> accessed 13 March 2025.

67 Brooke Guven and Lise Johnson, 'Third-Party Funding and the Objectives of Investment Treaties: Friends or Foes?' (Investment Treaty News, 27 June 2019).

68 International Energy Agency, *The Netherlands 2020 – Energy Policy Review* <https://www.connaissancedesenergies.org/sites/connaissancedesenergies.org/files/pdf-actualites/The_Netherlands_2020_Energy_Policy_Review.pdf > accessed 13 March 2025.

instances show how ISDS deters ambitious climate action by making sustainability costly.[69] Frequent FET-based challenges highlight the need to redefine investor protections for climate sovereignty.[70] Without reforms, ISDS will obstruct climate action, protect corporate interests, and delay sustainability.[71]

4. CONSTITUTIONAL & ECONOMIC JUSTICE- THE NEED FOR A NEW LEGAL FRAMEWORK

4.1. Investment Law v. Constitutional Sovereignty

The clash between investment law and constitutional sovereignty intensifies as states balance economic growth with environmental and social justice. Investment treaties aim to ensure legal stability but, through ISDS, often elevate corporate interests over constitutional rights.[72] This raises critical legal questions: Can investor rights override constitutional protections? Should investment tribunals rule on disputes affecting human and indigenous rights? Judicial pushback in India, Germany, and South Africa highlights a shift toward prioritizing public interest over corporate claims in investment law.[73]

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69 UNCTAD, *Investor-State Dispute Settlement Cases and Climate Change* (2022)..

70 European Commission, 'Investment Treaties and Energy Transition' <https://energy.ec.europa.eu/topics/international-cooperation/international-organisations-and-initiatives/energy-charter_en> accessed 13 March 2025.

71 Megan Darby, 'Belgium Quits Coal Power with Langerlo Plant Closure' *Climate Change News* (5 April 2016) <https://www.climatechangenews.com/2016/04/05/belgium-quits-coal-power-with-langerlo-plant-closure/> accessed 13 March 2025.

72 UNCTAD Investment Dispute Settlement Navigator, 'RWE v The Netherlands' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1145/rwe-v-netherlands> accessed 13 March 2025.

73 OECD, *Investment Treaties and Climate Change* (OECD report, 2022).

4.2. Judicial Resistance to ISDS in Constitutional Courts

Judicial resistance to ISDS signals a broader re-evaluation of investment law within domestic systems. The increasing judicial resistance to ISDS reflects a broader reassessment of investment law within domestic legal systems. This was exemplified in the Vodafone tax dispute,[74] wherein the court held against retrospective tax claims imposed on Vodafone by the Indian government. Vodafone's ISDS claim under India's BIT with the Netherlands was overridden by the Supreme Court, affirming India's sovereign right to regulate taxation.[75] Following this, India undertook a comprehensive review of its investment treaty regime, leading to the 2016 Model BIT, which explicitly limits ISDS claims by requiring investors to first exhaust domestic remedies.[76] This shift reflects a broader constitutional assertion that regulatory sovereignty cannot be subordinated to treaty-based investor claims.

Germany's constitutional court has actively challenged ISDS overreach. *Neubauer v. Germany*, the court reinforced the state's duty to enact climate policies in compliance with the Paris Agreement, ruling that failure to do so would violate the fundamental rights of future generations.[77] This decision has profound implications for ISDS cases targeting Germany's coal phase-out policies, such as *RWE v.*

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74 *Vodafone International Holdings BV v India* (2012) 6 SCC 613.

75 Flavia Marisi, *Rethinking Investor–State Arbitration* (Springer 2023) 36.

76 Kyla Tienhaara, 'Regulatory Chill in a Warming World' (2018) 7(2) *Transnational Environmental Law* 229, 231.

77 UNCITRAL Working Group III, *Possible Reform of ISDS* (UNCITRAL working paper, 2023).

Netherlands (2021).[78] The ruling reinforces the need to align ISDS with constitutional principles, a factor often disregarded in arbitration.

South Africa's Constitutional Court has upheld state policies aimed at rectifying historical injustices, resisting ISDS challenges. The court has upheld the primacy of public interest regulations, particularly in cases concerning land redistribution and Black economic empowerment.[79] These cases illustrate that constitutional protections must be integrated into investment arbitration, ensuring that economic justice considerations are not undermined by corporate rights.

4.3. The ISDS Failure in Protecting Human and Indigenous Rights

ISDS's disregard for human and indigenous rights exposes fundamental flaws in investment law. Many ISDS cases involve disputes over natural resource extraction, land rights, and environmental degradation, disproportionately affecting indigenous communities.[80] Investment tribunals routinely ignore human rights and indigenous legal frameworks in their decisions.

A stark example is *Bear Creek v. Peru*,[81] where an indigenous-led movement successfully pressured the Peruvian government to cancel a controversial mining project due to environmental and social

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78 Matthew Rimmer, 'The Chilling Effect: Investor–State Dispute Settlement, Graphic Health Warnings, and the Trans-Pacific Partnership' (2018) 7(1) *Victoria University Law and Justice Journal* 76, 92.

79 *Neubauer v Germany* [2021] 1 BvR 2656/18.

80 *Vodafone International Holdings BV v India* (2012) 6 SCC 613.

81 *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/21.

concerns.[82] The mining company, Bear Creek, subsequently filed an ISDS claim, arguing that the government's actions constituted an expropriation under the Canada-Peru BIT. The tribunal ruled in favour of Bear Creek, awarding substantial compensation despite widespread indigenous opposition.[83] Similarly, in *Eco Oro v. Colombia*, the Colombian government's decision to protect fragile ecosystems from mining operations led to an ISDS claim by a foreign investor, demonstrating how investment treaties fail to account for environmental and indigenous rights protections.[84] These cases expose a fundamental flaw in ISDS, that is, that the investment tribunals lack jurisdiction and expertise to adjudicate disputes involving human rights, indigenous sovereignty, and environmental justice, underscoring the need for systematic reform.

A reimagined ISDS framework must incorporate human rights law, ensuring that investment protections do not override constitutional and indigenous rights. One approach is to create 'Human Rights-Responsive Investment Tribunals,' where cases involving environmental and social justice issues are adjudicated with mandatory participation from human rights experts, indigenous representatives, and constitutional scholars.[85] This would prevent

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82 Government of India, *Model Text for the Indian Bilateral Investment Treaty*, art 15.2 (2015) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560> accessed 13 March 2025.

83 *Bear Creek Mining Corporation v Republic of Peru* (ICSID Case No ARB/14/21, Award, 30 November 2017).

84 *Eco Oro Minerals Corp v Republic of Colombia* (ICSID Case No ARB/16/41, Award, 9 September 2021).

85 European Parliament, 'MEPs Consent to the EU Withdrawing from the Energy Charter Treaty' (2024) <https://www.europarl.europa.eu/news/en/press-

ISDS from being a tool for corporate impunity and instead align investment law with emerging global human rights norms.

4.4. Alternative Treaty Models for Economic Justice

Alternative Treaty frameworks provide for important insights in furtherance of ISDS reform. The European Union's evolving investment policy provides a progressive model for sustainable investment governance. Amid growing concerns over ISDS, the European Union incorporated an Investment Court System ["ICS"] into trade agreements such as the Comprehensive Economic and Trade Agreement ["CETA"] with Canada.[86] Unlike traditional ISDS, the ICS establishes that there should be a court where matters are adjudged by full-time judges, ensuring greater transparency, consistency, and accountability in investment arbitration.[87] More significantly, the EU's latest sustainable investment agreements include explicit climate action carve-outs, ensuring that environmental regulations cannot be challenged under investment law.[88] The EU's 2024 withdrawal from the ECT reflects a broader departure from investment treaties that hinder climate action, offering a model for other states pursuing ISDS reform.[89]

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room/20240419IPR20549/meps-consent-to-the-eu-withdrawing-from-the-energy-charter-treaty> accessed 13 March 2025.

86 European Commission, 'Investment Court System (ICS) in EU Trade Agreements' (2023).

87 *Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA)* (signed 2016).

88 *United States–Mexico–Canada Agreement (USMCA)* (entered into force 2020).

89 Office of the United States Trade Representative, *Trade Policy Agenda and Annual Report* (2023).

The United States has also introduced environmental safeguards in its trade agreements, albeit with a more selective approach to ISDS reform. United States Mexico Canada Agreement ["USMCA"] curtailed the provisions of the ISDS, removing protections for speculative claims and preserving greater regulatory autonomy for environmental and labour policies.[90] Additionally, the Biden administration's trade policy explicitly prioritizes climate action, emphasizing that investment protections should not restrict environmental regulations.[91] Nevertheless, the U.S. approach remains inconsistent, as its BITs with Global South nations continue to include expansive ISDS provisions, increasing the risk of 'regulatory chill' and economic coercion.[92]

4.5. CIIF- The Constitutionally Integrated Investment Framework

While the EU and U.S. reforms mark progress, they remain incomplete, failing to fully integrate constitutional and economic justice considerations into investment law. ISDS reform must extend beyond procedural adjustments to incorporate substantive constitutional protections. This paper advances a Constitutionally Integrated Investment Framework ["CIIF"], a reimagined ISDS model that mandates-

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90 Wang, 'ISDS Reform and Environmental Governance: Addressing Climate Change Disputes Through UNCITRAL's Framework' (2024)

91 Sangeeta Shah, 'Jurisdictional Immunities of the State: Germany v Italy' (2012) 12(3) *Human Rights Law Review* 555.

92 Gus Van Harten, 'Origins of ISDS Treaties' in *The Trouble with Foreign Investment Protection* (OUP 2020) 17.

i. **Constitutional Supremacy-** Investment treaties must recognize constitutional courts as the ultimate arbitrators in disputes involving human rights and environmental policies.[93]

ii. **Mandatory Human & Indigenous Rights Protections-** Investment tribunals should include human rights experts and indigenous representatives in cases implicating social justice[94]

iii. **Climate Sovereignty Clause-** ISDS mechanisms must integrate legally binding provisions safeguarding environmental regulations from investor challenges.[95]

iv. **Public Interest Arbitration Panels-** Investment disputes affecting economic and social justice should be adjudicated by permanent, state-appointed judges rather than corporate-friendly arbitrators.[96]

Without these structural reforms, ISDS will continue to function as a legal instrument that prioritizes corporate profits over constitutional rights and environmental protections. Investment arbitration must evolve to reflect Anthropocene realities, embedding economic justice as a foundational principle of international law.

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93 Joshua Paine and Elizabeth Sheargold, 'A Climate Change Carve-Out for Investment Treaties' (2023) 36(2) *Journal of International Economic Law* 285.

94 Daniel B. Magraw & Sergio Puig, 'Greening Investor-State Dispute Settlement' (2018) 59 *B.C. L. Rev.* 2717.

95 UNGA 'Yearbook of the International Law Commission' (1983) UNYB, A/CN.4/SER.A/1983/Add. 1 (Part 2).

96 *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain,* ICSID Case No. ARB/14/1, Award (16 May 2018).

5. A NEW ISDS MODEL- REIMAGINING INVESTMENT PROTECTION IN THE ANTHROPOCENE

The Anthropocene necessitates investment reform, as ISDS allows corporations to challenge climate policies, forcing states to compensate investors. A Green ISDS model must align arbitration with Sustainable Development Goals ["SDGs"], enable treaty exits, and ensure climate-sensitive adjudication. Institutions like the World Bank and UNCTAD must help reshape investment arbitration to balance investor rights with sustainability. This section proposes an alternative ISDS framework that reimagines investment protection in the Anthropocene era, ensuring that climate governance and economic justice are not subordinated to corporate interests.

5.1. The Need for a Green ISDS Model

ISDS lacks binding environmental obligations, allowing investors to challenge state policies aligned with international climate commitments.[97] Green ISDS embeds sustainability obligations in arbitration, preventing claims that hinder carbon reduction, renewables, or biodiversity protections.[98] A reformed ISDS should-

i. Enforce SDGs in investment agreements, making sustainability a legal obligation.[99]

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97 UNCTAD Investment Dispute Settlement Navigator, 'RWE v The Netherlands' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1145/rwe-v-netherlands> accessed 13 March 2025.

98 OECD, *Investment Treaties and Climate Change* (OECD report, 2022).

99 Daniel B Magraw and Sergio Puig, 'Greening Investor-State Dispute Settlement' (2018) 59 *Boston College Law Review* 2717.

ii. Introduce sustainability carve-outs, shielding state policies aligned with climate treaties from ISDS claims.[100]

iii. Revise FET clauses, ensuring investor expectations do not supersede states' regulatory rights.[101]

iv. Shift the burden of proof, requiring investors to demonstrate that state actions lack legitimate environmental objectives.[102]

This approach would redefine the role of ISDS from a system that protects corporate profits to one that actively supports sustainable development, ensuring that investment law contributes to, rather than obstructs, climate action.[103]

5.2. Exiting Harmful Treaties Without Liability

Treaty withdrawal is impeded by financial and legal liability concerns.[104] Survival clauses trap states in outdated treaties misaligned with environmental goals.[105] The EU's ECT withdrawal shows states can exit harmful treaties while limiting liability.[106] Some nations have

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[100] Kyla Tienhaara, 'Regulatory Chill in a Warming World' (2018) 7(2) *Transnational Environmental Law* 229.9.

[101] UNCITRAL Working Group III, *Possible Reform of ISDS* (UNCITRAL working paper, 2023).

[102] Crina Baltag, Riddhi Joshi, and Kabir Duggal, 'Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?' (2023) 38(2) *ICSID Review – Foreign Investment Law Journal* 381.

[103] Christina Binder, Ursula Kriebaum, and August Reinisch, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009).

[104] Lorenzo Cotula, 'International Investment Law and Climate Change: Reframing the ISDS Reform Agenda' (2023) 24(4-5*) Journal of World Investment & Trade* 766.

[105] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2019).

[106] Susan D. Franck, 'Empiricism and International Investment Law: A Review of the Literature' (2012) *Virginia Journal of International Law.*

replaced ISDS with domestic or state-to-state dispute resolution.[107] South Africa successfully terminated its BITs with multiple European states, replacing them with the *Protection of Investment Act (2015)*, which prioritizes constitutional protections and public interest regulations over ISDS claims.[108] To ensure a smooth exit from harmful investment treaties, states should-

i. Coordinate multilateral exits to reduce individual state exposure.[109]

ii. Renegotiate treaties pre-withdrawal, incorporating transition mechanisms to restrict post-exit claims.[110]

iii. Invoke superior legal norms, prioritizing human rights and climate obligations over investment protections.[111]

iv. Challenge survival clauses, arguing they contravene constitutional sovereignty and sustainability commitments.[112]

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[107] Jean-Michel Marcoux, Andrea K. Bjorklund, Elizabeth A. Whitsitt, and Lukas Vanhonnaeker, 'Discourses of ISDS Reform: A Comparison of UNCITRAL Working Group III and ICSID Processes' (2024) 27(2) *Journal of International Economic Law* 314.

[108] Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Tool for Overcoming Institutional Conflicts' (2003) 25 *Michigan Journal of International Law*.

[109] Jorge E. Viñuales, 'Foreign Investment and Climate Change' in Andrea K. Bjorklund (ed), *Research Handbook on International Investment Law* (Edward Elgar Publishing, 2012).

[110] European Parliament, 'MEPs Consent to the EU Withdrawing from the Energy Charter Treaty' (2024) <https://www.europarl.europa.eu/news/en/press-room/20240419IPR20549/meps-consent-to-the-eu-withdrawing-from-the-energy-charter-treaty> accessed 13 March 2025.

[111] Markus W. Gehring and Andrew Newcombe, 'An International Environmental Court/Tribunal: An Option for the Future?' (2002) 11 *Review of European Community & International Environmental Law* 2.

[112] UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (United Nations, 2015).

By adopting these strategies, states can reclaim regulatory autonomy, ensuring that their climate policies are not dictated by the threat of ISDS litigation.[113]

5.3. Climate-Sensitive Arbitration Panels (CSAPs)

In order to correct the imbalance of investor-biased rulings over environmental policies, Climate-Sensitive Arbitration Panels ["CSAPs"] should be introduced, incorporating-

i. Judges with environmental law expertise, ensuring that investment disputes involving climate policies are adjudicated by legal experts in sustainability, human rights, and biodiversity law.[114]

ii. Mandatory climate impact assessments in ISDS proceedings, requiring tribunals to evaluate the ecological consequences of investor claims before rendering decisions.[115]

iii. Public interest representation, allowing civil society organizations, Indigenous groups, and environmental advocates to intervene in cases where investment disputes affect ecosystem integrity, climate goals, or human rights.[116]

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113 UNCITRAL, '*Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session'* (New York, 29 April–3 May 2019) A/CN.9/970.

114 Canada Model BIT, *Agreement Between Canada and [State] for the Promotion and Protection of Investments* (2014).

115 UNGA, *United Nations Convention on Jurisdictional Immunities of States and Their Property*, UNGA Res 59/38, 59th Session (2004) UN Doc Supp No 49 (A/59/49).

116 WTO, *The General Agreement on Tariffs and Trade (GATT 1947)* (July 1986).

iv. Precedential value for climate rulings, ensuring that tribunal decisions set binding legal standards for future ISDS cases involving environmental regulations.[117]

CSAPs, integrating scientific and legal expertise, would correct ISDS bias against climate policies.[118]

5.4. Institutional Reform- The Role of the World Bank & UNCTAD

ISDS reform needs World Bank and UNCTAD support.[119] As the architect of ISDS through the 1965 ICSID Convention, the World Bank must reform ICSID to align with contemporary climate and human rights imperatives.[120] UNCTAD, which has already begun advocating for sustainable investment governance, must lead the effort in designing new investment treaty templates that incorporate Green ISDS principles.[121] To achieve these goals, the World Bank and UNCTAD should-

i. Amend ICSID's arbitration rules, mandating that investment disputes related to climate policies be adjudicated under sustainability-based legal principles.[122]

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117 Daniel B. Magraw and Sergio Puig, 'Greening Investor-State Dispute Settlement' (2018) 59(8) *Boston College Law Review* 2717.

118 Christina Binder, Ursula Kriebaum, and August Reinisch (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009).

119 ICSID, *The ICSID Caseload – Statistics, Issue 2024-1*.

120 UNGA, 'Report of the Secretary-General on Convention on Jurisdictional Immunities of States and Their Property' (24 October 2001) 56th Session UN Doc A/56/291/Add1.

121 UN General Assembly, *Yearbook of the International Law Commission* (1983) UNYB A/CN.4/SER.A/1983/Add. 1 (Part 2).

122 Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008).

ii. Create model investment treaties that exclude ISDS protections for fossil fuel companies and industries with high environmental risks.[123]

iii. Develop an international investment framework that integrates environmental accountability, ensuring that global capital flows align with climate justice objectives.[124]

iv. Expand the role of sustainability experts in ISDS reform, ensuring that environmental governance is at the core of investment law transformation.[125]

These reforms would reshape investment law and prevent ISDS abuse against climate policies.[126]

6. POLICY RECOMMENDATIONS- POTENTIAL SOLUTIONS

The increasing rift between climate governance and investment treaties highlights the need to safeguard states' regulatory sovereignty. ISDS allows corporations to challenge emission reduction by states, renewable energy transitions, and fossil fuel phase-outs. To correct this imbalance, investment law must undergo a fundamental paradigm shift, prioritizing climate sovereignty, environmental

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123 Kyla Tienhaara and Lorenzo Cotula, *Raising the Cost of Climate Action? Investor–State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets* (International Institute for Environment and Development, 2020).

124 UNCTAD, *World Investment Report 2024: International Investment and Climate Action* (United Nations, 2024).

125 European Parliament, 'MEPs Consent to the EU Withdrawing from the Energy Charter Treaty' (2024) <https://www.europarl.europa.eu/news/en/press-room/20240419IPR20549/meps-consent-to-the-eu-withdrawing-from-the-energy-charter-treaty> accessed 13 March 2025.

126 UNCITRAL Working Group III, *Possible Reform of ISDS – Draft Provisions on Procedural and Cross-Cutting Issues* (2023) A/CN.9/WG.III/WP.231.

necessity, and legal accountability for corporate overreach. This section proposes five policy solutions that would turn investment arbitration into a system that protects rather than hinders sustainability.

6.1. A Mandatory 'Climate Sovereignty Override' Clause in Investment Treaties

An essential flaw in BITs and FTAs is the lack of explicit provisions safeguarding state sovereignty in environmental regulation. Without a 'Climate Sovereignty Override' clause, states compensate polluters for climate policies. Investment tribunals have historically ruled in favour of fossil fuel corporations, thus ensuring billions of dollars' worth of compensation by states, like in *RWE*, *Rockhopper, Vattenfall cases.*[127] To safeguard climate policies from investor-driven legal challenges, all BITs and FTAs must incorporate a mandatory 'Climate Sovereignty Override' clause, guaranteeing that-

i. No ISDS claim can be brought against environmental regulations that are in congruence with the Paris Agreement, UN climate treaties, or national sustainability laws.

ii. Investor protections are subordinate to state sovereignty in matters of public interest, including reduction of emissions, conservation of biodiversity, and energy transition.

[127] UNCTAD Investment Dispute Settlement Navigator, 'RWE v The Netherlands' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1145/rwe-v-netherlands> accessed 13 March 2025.

iii. Compensation claims vis-à-vis stranded fossil fuel assets are explicitly excluded from investment treaties.[128]

Such clauses therefore, safeguard state regulations from ISDS claims.

6.2. A New Doctrine of 'Environmental Necessity' to Prioritize Climate Commitments

ISDS tribunals broadly interpret FET clauses, letting investors claim damages when policies affect profits.[129] FET interpretations have increased investor claims, obstructing climate regulations. The introduction of an 'Environmental Necessity' doctrine would empower states to supersede investment protections in cases of severe climate risk.[130] The Environmental Necessity Doctrine would serve as a legal test within ISDS proceedings, enabling states to-

i. Demonstrate the necessity of a regulatory measure is essential for mitigating climate risks for example, coal plant shutdowns to comply with emissions reduction targets.

ii. Invalidate any investor claims that conflict with legally enforceable obligations to the environment so that sustainability commitments will prevail over treaty-based protections.[131]

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128 OECD, *Investment Treaties and Climate Change* (OECD report, 2022).

129 Kyla Tienhaara, 'Regulatory Chill in a Warming World' (2018) 7(2*) Transnational Environmental Law* 229, 231; Flavia Marisi, *Rethinking Investor–State Arbitration* (Springer 2023) 36.

130 Jorge E Viñuales, 'Foreign Investment and the Environment in International Law: The Current State of Play' (2007) 18 *Yearbook of International Environmental Law* 139.

131 Matthew Rimmer, 'The Chilling Effect: Investor–State Dispute Settlement, Graphic Health Warnings, the Plain Packaging of Tobacco Products, and the

iii. The investors are to substantiate that their claim will not hinder a legitimate climate policy.[132]

iv. This doctrine would establish a legal hierarchy in which the obligations of climate obligations would take precedence over commercial interests, reinforcing states' sovereign regulatory authority.[133]

6.3. Establishing a Global Climate Investment Court ["GCIC"]

Furthermore, it is essential that the ISDS must be restructured which addresses investor bias.[134] Currently, ISDS tribunals lack institutional independence, environmental expertise, and public accountability, frequently issuing decisions that prioritize investor interests over ecological sustainability. To rectify this, a GCIC should be established which acts as a specialized international tribunal primarily dealing with matters of environmental concerns vis-à-vis investment disputes. GCIC would introduce the following structural reforms-

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Trans-Pacific Partnership' (2018) 7(1) *Victoria University Law and Justice Journal* 76, 92.

132 OECD, *'The Notion of 'Indirect Expropriation' in Investment Treaties Concluded by 88 Jurisdictions: A Large Sample Survey of Treaty Provisions'* (OECD report, 19 October 2021) 4.

133 Joshua Paine and Elizabeth Sheargold, 'A Climate Change Carve-Out for Investment Treaties' (2023) 36(2) *Journal of International Economic Law* 285, 292.

134 Claire Provost and Matt Kennard, 'The Obscure Legal System that Lets Corporations Sue Countries' *The Guardian* (10 June 2015) <https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid> accessed 13 March 2025.

i. Mandatory environmental law expertise among judges, ensuring that all decisions are informed by climate science and sustainability principles.

ii. Binding jurisdiction over ISDS disputes in the field of environmental regulations, thus replacing the ad hoc and inconsistent arbitration system by a permanent, state-driven court.[135]

iii. A presumption in law in favour of climate policies, ensuring that disputes are resolved with a climate-first approach, rather than a corporate-first framework.

iv. A public interest intervention mechanism, allowing civil society, Indigenous groups, and environmental organizations to participate in disputes affecting sustainability and human rights.[136]

The GCIC would replace opaque, investor-driven ISDS with a transparent climate-focused tribunal.[137]

6.4. Criminalizing SLAPPs in ISDS

Corporations use ISDS to suppress climate activism via Strategic Lawsuits Against Public Participation ["SLAPPs"].[138] These

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135 Gus Van Harten, *The Trouble with Foreign Investment Protection* (OUP 2020) 17.

136 Julia Dehm, 'OECD Public Consultation on Investment Treaties and Climate Change' *Verfassungsblog* (19 November 2023).

137 Alessandra Arcuri, Kyla Tienhaara and Lorenzo Pellegrini, 'Investment Law v Supply-Side Climate Policies: Insights from Rockhopper v Italy and Lone Pine v Canada' (2024) 24 *International Environmental Agreements* 193, 198.

138 UNCTAD, *Treaty-Based Investor–State Dispute Settlement Cases and Climate Action* (IIA Issues Note, Issue 4, September 2022).

lawsuits impose prolonged litigation burdens on environmental defenders, depleting financial resources and discouraging activism. Fossil fuel corporations strategically deploy ISDS SLAPPs to intimidate and silence opposition against environmentally harmful projects, deterring regulatory action and climate advocacy.[139] To counteract this, ISDS frameworks must be reformed to criminalize SLAPP lawsuits, preventing corporations from abusing arbitration mechanisms to suppress climate advocacy. This would involve-

i. Declaring SLAPP lawsuits an abuse of process in ISDS, dismissing claims that seek to intimidate environmental defenders.

ii. Introducing financial penalties for corporations that file SLAPP claims, ensuring that investors who misuse ISDS mechanisms face substantial legal consequences.[140]

iii. Providing legal immunity for climate activists and NGOs targeted by SLAPP lawsuits, guaranteeing that environmental advocacy remains protected under international law.[141]

By eliminating corporate abuse of ISDS to suppress environmental activism, this reform would ensure that investment

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139 London School of Economics, 'What Is Climate Change Legislation?' (4 October 2022) <https://www.lse.ac.uk/granthaminstitute/explainers/what-is-climate-change-legislation/> accessed 13 March 2025.

140 Intergovernmental Panel on Climate Change Working Group III, *Mitigation of Climate Change* (2022) ch 15 'Investment and Finance' 1594.

141 UNCTAD Investment Dispute Settlement Navigator, 'Bear Creek Mining v Peru' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/589/bear-creek-mining-v-peru> accessed 13 March 2025.

arbitration cannot be exploited to silence voices demanding climate justice.[142]

6.5. Rewriting the Energy Charter Treaty (ECT) and BITs to Ban Fossil Fuel Protections

ECT hinders climate action, letting fossil fuel firms challenge emission reductions.[143] More than 60% of ISDS claims under the ECT have been filed by fossil fuel investors, demanding billions in compensation for projects halted due to climate regulations.[144] BITs still protect fossil fuel firms despite energy transitions.[145] To dismantle these legal barriers, investment agreements must be rewritten to explicitly ban fossil fuel protections. This would involve-

i. Removing fossil fuel protections from all BITs and FTAs, ensuring that investment agreements no longer shield polluting industries from climate regulations.[146]

ii. Amending ECT for prohibition of compensation claims for stranded fossil fuel assets, preventing investors from

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142 Rachel Nicholson and others, 'Investor-State Arbitration and the Environment' (Allens, 15 March 2021) <https://www.allens.com.au/insights-news/insights/2021/03/investor-state-arbitration-and-the-environment> accessed 13 March 2025.

143 UNCTAD Investment Dispute Settlement Navigator, 'Eco Oro v Colombia' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/756/eco-oro-v-colombia> accessed 13 March 2025.

144 OECD, *Investment Treaties and Climate Change* (OECD report, 2022).

145 Watson Farley & Williams, 'ISDS and Climate Change – What Happens Next?' (22 December 2022) <https://www.wfw.com/articles/isds-and-climate-change-what-happens-next/> accessed 13 March 2025.

146 *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21.

demanding billions when governments phase out coal plants, oil fields, or gas pipelines.[147]

iii. Introducing a Fossil Fuel Divestment Clause, legally requiring states to phase out investment treaty protections for fossil fuel projects within five years.[148]

Eliminating investment treaty protections for high-emission industries would prevent corporate interests from obstructing climate policies, facilitating a more rapid transition to clean energy.[149]

7. CONCLUSION

The development of the ISDS scheme has raised serious concerns regarding its constraints on state climate policy and the subsequent legal complications. In the Anthropocene, scrutiny towards sustainability compatibility increases, as corporations challenge state-driven environmental measures. RWE v. Netherlands and Rockhopper v. Italy demonstrate how tribunals may weigh such investor prerogatives over climate policy matters, thus heightening the need for ISDS reform.[150]

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147 Nathalie Bernasconi-Osterwalder and Sarah Brewin, *Terminating a Bilateral Investment Treaty* (IISD Best Practices Series – March 2020).

148 European Parliament, *EU Withdrawal from the Energy Charter Treaty* (Briefing Note, December 2023) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754632/EPRS_BRI(2023)754632_EN.pdf> accessed 13 March 2025.

149 UNCTAD Investment Dispute Settlement Navigator, 'Lone Pine v Canada' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/547/lone-pine-v-canada> accessed 13 March 2025.

150 UNCTAD Investment Dispute Settlement Navigator, 'RWE v The Netherlands' <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1145/rwe-v-netherlands> accessed 13 March 2025.

This paper advocates for ISDS reform based on constitutional supremacy, climate sovereignty, and human rights. Thereby, creating a reasonable balance between investment law vis-à-vis constitutional and international principles which become essential for a balanced framework.[151] The Climate Sovereignty Override clause and GCIC are reforms that represent a turn towards sustainable investment arbitration.[152] The Climate Sovereignty Override clause ensures state autonomy by prioritizing environmental regulations over investor rights, preventing misuse upon climate-related policies.[153] Inclusion of such a clause in future BITs and FTAs would reinforce regulations' sovereignty.[154] Environmental Necessity Doctrine assures states can bypass overseas investment protections when climate risks become critically grave.[155] It addresses the tendency of ISDS to frame environmental regulations as barriers rather than necessities.[156] Requiring investors to bear the burden of proof ensures that ISDS claims do not obstruct legitimate climate policies.[157] A GCIC would

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151 OECD, *Investment Treaties and Climate Change* (OECD report, 2022).

152 Flavia Marisi, *Rethinking Investor–State Arbitration* (Springer 2023) 36.

153 Kyla Tienhaara, 'Regulatory Chill in a Warming World' (2018) 7(2) *Transnational Environmental Law* 229, 231.

154 European Parliament, 'MEPs Consent to the EU Withdrawing from the Energy Charter Treaty' (2024) <https://www.europarl.europa.eu/news/en/press-room/20240419IPR20549/meps-consent-to-the-eu-withdrawing-from-the-energy-charter-treaty> accessed 13 March 2025.

155 Gus Van Harten, 'Origins of ISDS Treaties' in *The Trouble with Foreign Investment Protection* (OUP 2020) 17.

156 Rawnak Miraj Ul Azam, Syeda Afroza Zerin & Fahim Faisal Khan Alabi, 'ISDS Reform and Environmental Governance: Addressing Climate Change Disputes Through UNCITRAL's Framework' (2025) 5(1) *International Investment Law Journal* 51-73.

157 Martins Paparinskis, 'Rockhopper v Italy: The Energy Charter Treaty, Regulatory Expropriation and the Protection of Investments in Fossil Fuels' *Investment Treaty News* (12 December 2022).

provide an alternative to corporate-led arbitration by integrating environmental expertise into investment disputes, ensuring sustainability remains a central consideration.[158] Its inclusion of climate law experts and public interest representatives would promote a more balanced adjudicatory approach.[159] Addressing SLAPPs in ISDS is crucial in curbing the ability of corporations to weaponize law against environmental champions. Fossil fuel corporations have leveraged ISDS to suppress opposition and impose financial burdens on environmental defenders.[160] Recognizing SLAPP claims as legal abuse and imposing sanctions would safeguard climate activism from such tactics.[161] Fossil fuel protection in the ECT and BITs must be repealed, as those treaty measures bestow excessive rights on fossil fuel companies and obstruct climate action.[162] Removing such protections would eliminate major legal barriers to energy transition.[163] The aforementioned reforms seek a climate-governance balance with investment protection. ISDS arbitration thereby has to be updated to the conditions of the Anthropocene, ensuring that protective measures granted to investors are in line with environmental and human rights

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158 *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12.

159 Joshua Paine and Elizabeth Sheargold, 'A Climate Change Carve-Out for Investment Treaties' (2023) 36(2) *Journal of International Economic Law* 285.

160 Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2003) 25 *Michigan Journal of International Law* 4.

161 Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP 2008) 3.

162 Markus W. Gehring and Andrew Newcombe, 'An International Environmental Court/Tribunal: An Option for the Future?' (2002) 11 *Review of European Community & International Environmental Law* 2.

163 Jorge E. Viñuales, 'Foreign Investment and Climate Change' in Andrea K. Bjorklund (ed), *Research Handbook on International Investment Law* (Edward Elgar Publishing 2012) 527-550.

imperatives. A law regime should mould every further treaty and legal decision. Reformation of ISDS is requisite for international climate governance, and its legitimacy is dependent on how far it would adjust to the sustainability problems.[164] ISDS's legitimacy depends on its adaptation to global sustainability challenges. The proposed reforms provide a viable framework for investment arbitration, ensuring it no longer shields polluters but instead fosters climate justice and economic fairness. The Anthropocene necessitates a legal framework that responds to climate urgency. ISDS must evolve beyond outdated corporate doctrines to prioritize sustainability. These reforms advance the discourse on investment law's evolution.

[164] UNCITRAL, '*Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (New York, 29 April–3 May 2019)*'(A/CN.9/970, 2019).