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Phone : +91 73059 14348 – [info@iledu.in](mailto:info@iledu.in) / [Chairman@iledu.in](mailto:Chairman@iledu.in)



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# CRITICAL ANALYSIS OF EX POST FACTO ENVIRONMENTAL CLEARANCE APPROVALS UNDER THE ENVIRONMENT (PROTECTION) ACT, 1986 IN INDIA

**AUTHOR** – ADITI H S, STUDENT AT SCHOOL OF LAW, CHRIST (DEEMED TO BE UNIVERSITY)

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## Abstract:

In India, Environmental Clearance (EC) is a vital regulatory procedure that must be followed to ensure that development projects adhere to statutory environmental mandates. This paper critically examines the practice of granting ex post facto EC approvals in India under the Environment (Protection) Act, 1986 (EPA) and Environmental Impact Assessment (EIA) Notification, 2006. The concern is regarding the compliance mechanisms revolving around the environment preservation laws in India. The Draft EIA 2020 and the 7 July 2021, Ministry of Environment, Forest and Climate Change (MoEFCC) Office Memorandum (OM) were criticised for effectively allowing environmental clearances for already commenced projects. The retroactive regularisation of the projects is violative of the precautionary principle under the Statutory and Constitutional provisions, especially Article 21 and 14. The recent judgement of *Vanashakthi v. Union of India* has been a landmark case which tries to resolve the routine ex post facto ECs. Subsequently, striking down the validity of the notifications and OMs that directly or indirectly allowed for such clearances. This paper incorporates doctrinal and analytical research approach through analysing Constitution of India, EPA, EIA notifications, judicial decisions. Along with international norms, such as Sustainable Developmental Goals (SDGs), policies regarding environment and scholarly articles. It argues that retrospective approvals compromises integrity thereby having serious ecological and health impacts. The analysis is in the view that ECs should not be procured post facto unless there are extraordinary circumstances, that are further subject to strict court supervision. Finally, it proposes suggestions to the issues circumscribing compliance, integrity, and enforcement by reinforcing nexus between development and environment priorities.

**Keywords:** Environment (Protection) Act, 1986, Environmental Impact Assessment, Ex post facto environmental clearances, Precautionary principle, Sustainable Development Goals

## I. Introduction

### A. Background to Environmental Clearance

Environmental Clearance (EC) serves as a crucial procedural mechanism in regulating the India's environmental governance framework, by preventing undue harm and balancing the developers and ecological interests. Under the Environment (Protection) Act, 1986<sup>498</sup> and the

Environment Impact Assessment (EIA) 1994 and 2006, projects listed under Category A and Category B must report the potential environmental implications and procure clearance by the central government through the MoEFCC<sup>499</sup> and State Environment Impact Assessment Authority (SEIAA)<sup>500</sup> respectively.

<sup>498</sup> The Environment (Protection) Act, No. 29 of 1986, India

<sup>499</sup> Ministry of Environment & Forests, *Environmental Impact Assessment Notification* S.O. 1533(E) (Sept. 14, 2006) (India)

<sup>500</sup> State Environment Impact Assessment Authority (SEIAA), constituted under the *Environment Impact Assessment Notification*, S.O. 1533(E), Gazette of

The motto behind obtaining ECs is the precautionary principle of preventing harm before the fact, meaning environmental harms must be anticipated, assessed and mitigated before the project execution. ECs therefore operate as a tool to enhance economic development without harming the ecology, by mandating environmental considerations into the planning and approval processes of industrial, mining, infrastructural, and urban projects. This approach aligns with the precautionary principle, polluter pays principle, and SDGs as endorsed by the *Vellore Citizens Welfare Forum v. Union of India*, where industries must prevent environmental harm before fact or compensate for any harm caused post fact.<sup>501</sup> And in *Narmada Bachao Andolan v. Union of India and Ors.*, it reinforced SDGs by quoting that development should be sustained by nature.<sup>502</sup> These principles strengthen the legal prospectus that environmental harm must be calculated ex ante, and that polluters are liable for environmental consequences of their projects.

## B. Evolution of Environment Clearance Regime in India

The Environmental Clearance (EC) framework in India did not emerge overnight but developed gradually alongside growing awareness of environmental protection. Until the mid-1970s, development planning largely ignored environmental concerns, and any form of environmental assessment was informal and limited to specific sectors. The period between 1976 and 1977 marked an initial shift, influenced by international developments such as the Stockholm Declaration, 1972, and increasing domestic concern over industrial pollution.<sup>503</sup> However, these early efforts had no statutory force and remained weak in implementation. A turning point came after the Bhopal Gas

Disaster of 1984<sup>504</sup>, which revealed serious shortcomings in India's environmental regulatory system.<sup>505</sup> This led to the enactment of the Environment (Protection) Act, 1986 (EPA)<sup>506</sup>, empowering the Central Government to regulate activities affecting the environment and to frame rules and notifications. The EPA became the backbone of environmental governance in India. Subsequently, the EIA Notification, 1994 introduced the requirement of prior environmental clearance for certain projects, recognising the importance of assessing environmental impacts before project commencement.<sup>507</sup> The EIA Notification, 2006 further refined this process through decentralised appraisal and mandatory public consultation.<sup>508</sup> However, post-2017 regulatory changes, particularly violated preventive nature of the ECs under the EIA procedure, recently practice of ex post facto ECs has been normalised, where projects that have commenced without ex ante clearance have been regularised retrospectively.<sup>509</sup> The Draft EIA 2020 and the MoEFCC Office Memorandum of 7<sup>th</sup> July 2021 amplified this trend. The project proponents argue that ex post facto clearances reduce procedural hurdles and promote ease of doing business, and the critics contends that such regularisation undermines Constitution and legal mandates, erode integrity and environment. Article 14<sup>510</sup> and 21<sup>511</sup> of the Constitution of India is violated, as Article 14 guarantees equality before law and ensures anti-arbitrariness, while Article 21 advocates for healthy environment as part of right to life. The

India, Extraordinary, pt. II, sec. 3(ii) (Sept. 14, 2006), <https://environmentclearance.nic.in>

<sup>501</sup> *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647 (Ind.)

<sup>502</sup> *Narmada Bachao Andolan v. Union of India & Ors.*, (2000) 10 SCC 664 (Ind.)

<sup>503</sup> Declaration of the United Nations Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1416 (1972), available at <https://legal.un.org/avl/ha/dunche/dunche.html>

<sup>504</sup> Daya R. Varma & Roli Varma, *The Bhopal Disaster of 1984*, 25 *Bull. Sci., Tech. & Soc.* 37, 37–45 (2005), <https://doi.org/10.1177/0270467604273822>

<sup>505</sup> *Union Carbide Corp. v. Union of India*, (1989) 1 S.C.C. 674 (India); see also Upendra Baxi, *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case*, 36 *J. Indian L. Inst.* 1 (1985), available at <https://www.jstor.org/stable/43950427>

<sup>506</sup> The Environment (Protection) Act, No. 29 of 1986, India

<sup>507</sup> Environmental Impact Assessment Notification, 1994, S.O. 60(E), Gazette of India (Jan. 27, 1994), available at <https://mpcb.ecmpcb.in/images/pdf/EIA.pdf>

<sup>508</sup> Naveen Thayyil, *Public Participation in Environmental Clearances in India: Prospects for Democratic Decision-Making*, 56 *J. Indian L. Inst.* 463 (2014), <https://www.jstor.org/stable/43953725>

<sup>509</sup> Raphael B. B. Mwalyosi, Ross Hughes & David Howlett, *Orientation Course on Environmental Impact Assessment in Tanzania: Resource Handbook* (Int'l Inst. for Env't & Dev. & Inst. for Resource Assessment 1999), <https://www.ied.org/7793ied>

<sup>510</sup> The Constitution of India, art. 14

<sup>511</sup> The Constitution of India, art. 21

retrospective approvals also have an impact on public health and ecology, further weakening the polluter pay principle and doctrine of absolute liability. It shields developers from accountability for the harm that they have caused. This allowed for dilution of framework of EC approvals triggering legal and constitutional concerns that later invited judicial scrutiny.

### C. Current Status of Environment Clearance Regime in India

As of 2025, the EC regime in India continues to be governed by the EIA Notification, 2006<sup>512</sup>, requiring prior EC for specified projects through the MoEFCC and SEIAA. While the framework formally retains components such as expert appraisal and public consultation, its preventive character has been weakened in practice by administrative inefficiencies and executive interventions. The introduction of mechanisms permitting post facto ECs, particularly through policy instruments issued after 2017, significantly altered the nature of environmental regulation.<sup>513</sup> However, recent judicial developments have sought to correct this dilution. The Supreme Court in *Vanashakti v. Union of India* held that routine ex post facto ECs are legally impermissible, unless there are extraordinary circumstance and are subject to strict judicial scrutiny.<sup>514</sup>

### D. Consequences of Ex Post Facto Approvals

The practice of granting ex post facto ECs represents a serious compromise of India's environmental regulatory framework, fundamentally undermining the preventive ethos envisioned under the EPA, and the EIA Notification, 2006. When projects are allowed to commence without prior assessment, it creates a dangerous precedent that rewards non-

compliance and treats legal obligations as optional, thereby weakening institutional credibility. The environmental consequences are often permanent, with ecosystems disrupted, species threatened, and natural balances irreversibly altered. Communities bear the adverse effects, facing pollution, health hazards, and diminished quality of life before any corrective measures are even considered. Additionally, such retrospective approvals hollow out participatory governance, as mechanisms for public input, expert evaluation, and environmental management lose their significance. The fundamental principles of polluter accountability and strict liability, reducing complex environmental harm to monetary settlements and procedural formalities. Ultimately, ex post facto clearances erode both ecological integrity and the rule of law, subordinating long-term environmental sustainability to short-term administrative convenience.

### E. Research Objectives and Methodology

The study aims to evaluate the legal, constitutional, and judicial implications of ex post facto ECs in India. The first objective is to analyse the outcomes of the EIA 2006, issued under Section 3 of EPA read with Rule 5(3)(d) of the Environment (Protection) Rules, 1986<sup>515</sup> (EPR) in granting post facto ECs; second, to examine the judicial decisions and interpretation of post facto ECs; third to assess the constitutional provisions relevant to ex post facto ECs, especially Articles 14, 21, 48A<sup>516</sup>, and 51A(g)<sup>517</sup>, and their application in protection of ecology and public health. To achieve these objectives the paper employs doctrinal and analytical methodology, using primary legal sources, judicial interpretations, and secondary scholarly sources. This approach allows for efficient evaluation of legal mandates, judicial interpretations, and policy implications. It highlights the challenges and effects of retrospective ECs in India.

<sup>512</sup> Environmental Impact Assessment Notification, 2006, S.O. 1533(E), Gazette of India, Extraordinary, pt. II, sec. 3(ii) (Sept. 14, 2006), available at [https://v1.wii.gov.in/environmentalclearance\\_18](https://v1.wii.gov.in/environmentalclearance_18)

<sup>513</sup> Office Memorandum (Standard Operating Procedure for Handling Violation Cases under the EIA Notification), F. No. 22-21/2020-IA-III (July 7, 2021) (Ministry of Environment, Forest and Climate Change, Indira Paryavaran Bhawan, New Delhi), available at [https://environmentclearance.nic.in/writeraddata/OMs-2004-2021/256\\_OM\\_07\\_07\\_2021.pdf](https://environmentclearance.nic.in/writeraddata/OMs-2004-2021/256_OM_07_07_2021.pdf)

<sup>514</sup> *Vanashakti v. Union of India*, 2025 SCC OnLine SC 1139 (Ind. May 16, 2025)

<sup>515</sup> *Environment (Protection) Rules*, S.O. 1533(E), Rule 5(3)(d) (1986), India

<sup>516</sup> The Constitution of India, art. 48A

<sup>517</sup> The Constitution of India, art. 51A(g)

## II. Constitutional and Statutory Analysis of Ex Post Facto ECs

### A. Constitutional Analysis of Ex Post Facto ECs

The grant of ex post facto ECs raises significant constitutional concerns when examined under Articles 14, 21, 48A and 51A(g) of the Constitution of India. Environmental protection in India is not limited to statutory mechanisms under the EPA, but forms an integral part of the constitutional framework itself. The Supreme Court has repeatedly held that the right to life under Article 21 includes the right to live in a clean and healthy environment. Environmental degradation, therefore, is not merely a regulatory issue but one that directly affects human life and dignity. When projects are permitted to operate without prior ECs and are later regularised, individuals and communities are exposed to environmental risks without adequate assessment or safeguards, which weakens the constitutional protection guaranteed under Article 21. The EIA process is designed as a preventive mechanism. Its purpose is to evaluate potential environmental harm before a project begins, allowing authorities and the public to assess risks and suggest safeguards. Granting ECs after a project has already commenced defeats this purpose. Once environmental damage has occurred, regulatory intervention becomes remedial rather than preventive. Such an approach reduces environmental protection to damage control and undermines the procedural safeguards that are essential to the right to life.

Ex post facto ECs also raise concerns under Article 14 of the Constitution, which prohibits arbitrariness and ensures equality before the law. Retrospective approvals create an unreasonable distinction between project proponents who comply with legal requirements by obtaining prior clearance and those who violate the law by commencing operations without approval. Allowing violators to regularise their actions through post facto

clearances effectively rewards non-compliance and weakens regulatory discipline. This unequal treatment lacks a rational basis and fails to meet the standard of fairness expected of administrative action under Article 14. Further, the discretionary nature of such approvals, often granted through executive instruments, increases the risk of selective enforcement and undermines transparency. The constitutional commitment to environmental protection is further reflected in Article 48A, which places a duty on the State to protect and improve the environment, and Article 51A(g), which imposes a fundamental duty on citizens to safeguard natural resources. Although these provisions are part of the Directive Principles and Fundamental Duties, the judiciary has consistently relied upon them to strengthen environmental protection under Article 21. Together, they indicate a constitutional preference for precautionary and anticipatory environmental governance. The practice of granting ex post facto clearances runs contrary to this approach, as it allows environmental harm to occur before regulatory oversight is exercised. Read together, Articles 14, 21, 48A and 51A(g) suggest that environmental governance in India must be preventive, fair, and non-arbitrary. The routine grant of retrospective ECs undermines this constitutional framework by legitimising violations and prioritising administrative convenience over environmental and human well-being. For these reasons, ex post facto ECs remain constitutionally questionable and difficult to reconcile with the environmental rule of law envisaged by the Constitution of India.

### B. Statutory Analysis of Ex Post Facto ECs

The statutory framework governing ECs in India is firmly rooted in the EPA and the EIA 2006 issued thereunder. When these instruments are read purposively, it becomes evident that the ECs regime is conceived as a prior, preventive safeguard, rather than a post-violation mechanism for regularising non-compliance. The statutory scheme leaves less scope for the routine grant of ex post facto ECs. Section 3 of

the EPA<sup>518</sup> vests regulatory powers in the Central Government to take measures for protecting and improving environmental quality and for preventing environmental pollution. The emphasis on *prevention* and *control* within this provision reflects a clear legislative intent that environmental risks must be assessed and addressed before potentially harmful activities are permitted to commence. This preventive orientation is reinforced by Section 5 of the Act, which authorises the issuance of binding directions, including the regulation or closure of industries operating in violation of environmental norms.<sup>519</sup> In furtherance of these statutory powers, the EIA Notification, 2006, issued under Section 3 of the EPA read with Rule 5 of the EPR, 1986<sup>520</sup>, mandates the grant of prior ECs for projects specified in its Schedule. Paragraph 2 of the Notification expressly prohibits the commencement of construction or operation without obtaining ECs from the competent authority.<sup>521</sup> The language of the Notification is unambiguous in treating ECs as a condition precedent to project execution, rather than a curative approval capable of being obtained after the fact.

The EIA process is structured around procedural safeguards such as expert appraisal, public consultation, and the formulation of environmental management plans. These safeguards derive their legitimacy and effectiveness from being undertaken *ex ante*, enabling informed decision-making and meaningful public participation. Granting ECs after a project has already commenced substantially undermines this framework, as environmental damage may already have occurred and public consultation is reduced to a symbolic exercise devoid of real influence. Executive instruments such as OM and draft notification of 2020 issued by the MoEFCC after

2017 sought to introduce pathways for post facto ECs. Such executive measures are legally vulnerable, as subordinate legislation and administrative instructions cannot override or dilute the requirements of the parent statute. The use of OM to retrospectively regularise environmental violations amounts to an impermissible expansion of executive discretion and undermines the legislative purpose of the EPA. Moreover, the enforcement architecture of the EPA treats environmental violations as serious offences attracting penal consequences under Section 15, thereby emphasising deterrence and accountability. The practice of granting *ex post facto* ECs weakens this framework by transforming substantive statutory violations into condonable irregularities, creating perverse incentives for project proponents to bypass prior clearance requirements. Viewed in this light, *ex post facto* ECs are fundamentally inconsistent with the object, scheme, and preventive design of the EPA and the EIA Notification, 2006. They dilute the statutory discipline of environmental regulation and distort the balance between developmental objectives and environmental protection envisaged by the legislature.

### III. Judicial Analysis of Ex Post Facto ECs

#### A. Early Environmental Jurisprudence

Indian courts have played a decisive role in shaping the ECs regime by embedding constitutional values and environmental principles into statutory interpretation. Judicial responses to *ex post facto* ECs reflect an evolving jurisprudence that increasingly rejects retrospective regularisation and reinforces the preventive character of environmental governance. The foundation of Indian environmental jurisprudence was laid through judicial recognition of the precautionary principle and the polluter pays principle as integral components of domestic law. In *M.C. Mehta*<sup>522</sup> case, the Supreme Court held that environmental protection and public health must take precedence over economic

<sup>518</sup> Environment (Protection) Act, § 3, No. 29, Acts of Parliament, 1986 (India)

<sup>519</sup> Environment (Protection) Act, § 5, No. 29, Acts of Parliament, 1986 (India)

<sup>520</sup> Environment (Protection) Rules, r. 5, S.O. 844(E), Gazette of India, pt. II, sec. 3(ii) (1986) (India)

<sup>521</sup> Environmental Impact Assessment Notification, ¶ 2, S.O. 1533(E), Gazette of India, pt. II, sec. 3(ii) (Sept. 14, 2006) (India)

<sup>522</sup> *M.C. Mehta v. Union of India*, (1987) 1 SCC 395

considerations such as employment and industrial growth. The Court evolved the doctrine of absolute liability, holding that enterprises engaged in hazardous activities bear strict responsibility for environmental harm, irrespective of fault. This marked a decisive shift from remedial to preventive environmental regulation.

The jurisprudence was further consolidated in *Vellore Citizens Welfare Forum* case, where the Supreme Court explicitly recognised the precautionary principle and polluter pays principle as essential features of Indian environmental law.<sup>523</sup> The Court held that environmental measures must anticipate, prevent, and attack the causes of environmental degradation, rather than merely respond after harm has occurred. Importantly, the Court linked these principles to Articles 21, 47, 48A, and 51A(g) of the Constitution, thereby constitutionalising environmental protection. These decisions established that environmental harm must be assessed and mitigated ex ante, forming the normative basis against retrospective environmental approvals.

### B. Judicial Rejection of Routine Retrospective Environmental Clearances

The Supreme Court progressively narrowed the scope for post facto ECs. In *Common Cause v. Union of India*, the Court unequivocally held that ex post facto environmental clearances are contrary to the fundamental principles of environmental jurisprudence.<sup>524</sup> The case, arising from illegal mining operations, emphasised that EC is a condition precedent and cannot be granted after the commencement of operations. The Court observed that permitting post facto approvals would amount to legitimising illegality and would defeat the deterrent purpose of environmental regulation.

This position was strengthened in *Alembic Pharmaceuticals Ltd. v. Rohit Prajapati*, where the Supreme Court categorically rejected the

concept of ex post facto ECs. The Court described such approvals as “alien to environmental jurisprudence” and held that they render the entire EIA process illusory.<sup>525</sup> It emphasised that allowing projects to operate first and seek approval later undermines public participation, expert appraisal, and environmental safeguards, thereby eroding the rule of law. In *Electrosteel Steels Ltd. v. Union of India*, however, the Court adopted a more nuanced approach. While acknowledging that ex post facto clearances are generally impermissible, it allowed a limited form of regularisation subject to the imposition of environmental compensation and strict compliance conditions.<sup>526</sup> This judgment has been interpreted as a fact-specific exception rather than a general endorsement of retrospective clearances. Subsequent judicial discourse clarifies that *Electrosteel* case cannot be treated as a precedent to normalise post facto approvals, particularly where environmental damage is substantial.

### C. Consolidation of the Preventive Doctrine

The preventive character of environmental law was further reinforced through long-standing judicial interventions in forest and environmental governance. In *T.N. Godavarman Thirumulpad v. Union of India*<sup>527</sup>, the Supreme Court consistently emphasised that environmental protection requires continuous oversight, strict compliance, and a precautionary approach. Although not directly concerned with ECs, the case underscores the judiciary’s insistence on anticipatory regulation and strict enforcement in environmental matters. The jurisprudential trajectory reached its culmination in *Vanashakti v. Union of India*, where the Supreme Court decisively addressed the legality of ex post facto ECs. The Court held that routine retrospective clearances are legally impermissible and violate the EPA, the EIA Notification, 2006, and constitutional mandates

<sup>523</sup> *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647

<sup>524</sup> *Common Cause v. Union of India*, (2017) 9 SCC 499

<sup>525</sup> *Alembic Pharmaceuticals Ltd. v. Rohit Prajapati*, (2020) 17 SCC 157

<sup>526</sup> *Electrosteel Steels Ltd. v. Union of India*, (2021) 17 SCC 1

<sup>527</sup> *T.N. Godavarman Thirumulpad v. Union of India*, (1997) 2 SCC 267

under Articles 14 and 21. It struck down executive instruments, including office memorandum, that directly or indirectly facilitated post facto approvals. The Court clarified that any departure from the requirement of prior ECs can be permitted only in rare and exceptional circumstances, subject to strict judicial scrutiny. This judgment conclusively reaffirmed that ECs is a preventive safeguard, not a post-violation regularisation mechanism. A cumulative reading of judicial precedents reveals a clear and consistent judicial stance that ECs must be obtained prior to project commencement, and ex post facto approvals undermine the very purpose of environmental regulation. While courts have occasionally permitted limited regularisation in exceptional cases, such tolerance does not extend to routine administrative practice. The judiciary has firmly positioned environmental governance within a constitutional and preventive framework, rejecting retrospective clearances as incompatible with environmental rule of law.

#### IV. Normative and International Law perspectives on ex post facto ECs

##### A. Ecocentric Environmental Governance and Intrinsic Value of Nature

Indian environmental jurisprudence is informed not only by statutory imperatives but also by a constellation of theoretical constructs that lend it both normative depth and doctrinal coherence. These theoretical foundations collectively elucidate why ex post facto ECs are incongruous with legal, ethical, and global environmental norms. At the heart of modern environmental jurisprudence lies a shift from viewing nature as a mere reservoir of exploitable resources to recognising its intrinsic moral and ecological worth.<sup>528</sup> This transformation is consonant with ecocentric theory<sup>529</sup>, which posits that ecosystems cannot be understood solely through their utility to humankind. Ecocentric perspectives have

<sup>528</sup> Arne Naess, *The Shallow and the Deep, Long-Range Ecology Movement: A Summary*, 16 *Inquiry* 95 (1973), <https://doi.org/10.1080/00201747308601682>

<sup>529</sup>“Ecocentrism,” *Encyclopaedia Britannica* (accessed Dec. 31, 2025), <https://www.britannica.com/topic/ecocentrism>

permeated legal scholarship and judicial reasoning, urging courts to treat ecological systems not as instruments of developmental expediency but as bearers of inherent ecological value. Such an approach is reflected in global environmental justice discourse and resonates with international jurisprudence that emphasises ecological integrity over short-term gains, a theme explored in environmental ethical literature where both the precautionary principle and the polluter pay principle are necessary to sustainable development frameworks.<sup>530</sup>

This normative insight explains why post-damage regularisation through ex post facto ECs is deeply problematic. Retrospective approvals, by validating environmental harm after it has occurred, effectively reduce nature to a negotiable externality. They invert the ethical order embedded in ecocentric reasoning by implying that ecological degradation can be legitimised through procedural forgiveness or financial compensation. In contrast, ecocentric governance demands that environmental assessment and approval occur before harm is inflicted, in order to preserve ecological wholeness and interdependent life systems.

##### B. Precautionary Principle, Polluter Pays Principle, and Absolute Liability Doctrine

*Precautionary Principle*<sup>531</sup> mandates anticipatory government action to forestall environmental harm in circumstances of scientific uncertainty, embodying a forward-looking orientation that privileges risk avoidance over remedial reaction.<sup>532</sup> This principle has been recognised both domestically and internationally as a cornerstone of sustainable environmental governance; it is part of constitutional environmental jurisprudence and has been

<sup>530</sup> Nupur Chowdhury, *Sustainable Development as Environmental Justice: Exploring Judicial Discourse in India*, 51 *Econ. & Pol. Wkly.* 84 (2016), available at <https://www.jstor.org/stable/44004515>

<sup>531</sup> Palak Mathur, *Precautionary Principle*, 4 *INT’L J.L. MGMT. & HUMAN.* 1785 (2021).

<sup>532</sup> Rio Declaration on Environment and Development, princ. 15, supra note 2.

treated as a norm of Indian law.<sup>533</sup> *Polluter Pays Principle*<sup>534</sup> requires that those who generate pollution bear the costs of both damage prevention and remediation.<sup>535</sup> The principle encapsulates the notion that absolute liability for environmental harm extends beyond mere compensation to encompass the full cost of restoring degraded ecological conditions.<sup>536</sup> In the Indian context, this doctrine has been interpreted as a substantive obligation on the state and polluters alike, deterring harmful activities by internalising environmental costs rather than externalising them onto society.<sup>537</sup> *Absolute Liability Doctrine* intensifies this obligation by imposing strict and non-delegable responsibility on hazardous enterprises.<sup>538</sup> Originating in *M.C. Mehta* case, this doctrine obliterates exceptions to liability in cases of inherently dangerous activities, thereby reinforcing the normative thrust of both the polluter pays principle and preventive governance.<sup>539</sup> Taken together, these principles function as a coherent framework that insists on ex ante assessment and accountability. Ex post facto clearances, by legitimising operations after environmental impact has already occurred, flout precautionary logic, institutionalise a “pollute and pay”<sup>540</sup> approach, and undermine the deterrent force that absolute liability seeks to instil. They reduce complex ecological and social harms to mere financial transactions, contravening foundational norms of environmental justice.

<sup>533</sup> D. Shanmuganathan & L. M. Warren, *Status of Sustainable Development as a Principle of National and International Law: The Indian Approach*, 9 J. Env'tl. L. 387 (1997), available at <https://www.jstor.org/stable/44248138>

<sup>534</sup> Boris N. Mamlyuk, *Analyzing the Polluter Pays Principle through Law and Economics*, 18 SE. ENVTL. L.J. 39 (Fall 2009)

<sup>535</sup> Rio Declaration on Environment and Development, princ. 16, supra note 2.

<sup>536</sup> Satish C. Shastri, *“The Polluter Pays Principle” and the Supreme Court of India*, 42 J. Indian L. Inst. 108 (2000), available at <https://www.jstor.org/stable/43951740>

<sup>537</sup> Federico Jarat, *Non-Proliferation of Nuclear Weapons and Confidence-Building: A Comparative Analysis: Argentina and Brazil – An Example for South Asia?*, (2021) 1 NLIU L. Rev. 347, available at <https://nliulawreview.nliu.ac.in/wp-content/uploads/2022/10/Volume-X-Issue-II.pdf>

<sup>538</sup> Furqan Ahmad, *Origin and Growth of Environmental Law in India*, 43 J. Indian L. Inst. 358 (2001), available at <https://www.jstor.org/stable/43951782>

<sup>539</sup> *M.C. Mehta v. Union of India*, (1987) 2 SCC 353 (India)

<sup>540</sup> Aruna Bezawada Venkat, *“Polluter Pays” Principle: A Policy Principle*, SSRN Elec. J. (Feb. 7, 2012), <https://ssrn.com/abstract=2458284>

### C. Sustainable Development Goals, International Commitments, and Global Norms

The normative architecture of environmental governance must also be situated within the broader context of international environmental law and global sustainability commitments. The Stockholm Declaration of 1972<sup>541</sup> first articulated environmental preservation as an essential dimension of human well-being. This was expanded in the Rio Declaration, which enshrined principles such as the precautionary approach and sustainable development as international norms.<sup>542</sup> Further, through the Paris Agreement, India has committed to ambitious climate action, underscoring the necessity of proactive environmental governance.<sup>543</sup> India has reflected these global commitments by incorporating similar principles into domestic law and judicial interpretation.<sup>544</sup> Furthermore, Sustainable Development Goals<sup>545</sup> (SDGs) such as SDG 3 (Good Health and Well-Being)<sup>546</sup>, SDG 13 (Climate Action)<sup>547</sup>, and SDG 15 (Life on Land)<sup>548</sup> embody integrated and forward-looking commitments to ecological resilience and human dignity.<sup>549</sup> These goals reaffirm that environmental protection is not about achieving balance in retrospect but about preventing harm, sustaining ecosystems, and ensuring

<sup>541</sup> Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev.1 (June 16, 1972), available at <https://legal.un.org/avl/ha/dunche/dunche.html>

<sup>542</sup> Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, June 3-14, 1992, princ. 1–27, available at <https://www.cbd.int/doc/ref/rio-declaration.shtml>

<sup>543</sup> Paris Agreement, Dec. 12, 2015, U.N. Framework Convention on Climate Change, FCCC/CP/2015/L.9/Rev.1, available at [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf)

<sup>544</sup> Pratibha Singh, Anoop Singh & Piyush Malaviya, *Sustainable Development: A Harmonious Concept Between Environment and Development*, in *Lex Terra Issue 30* (National Law University Assam, Oct. 2025), available at [https://nluassam.ac.in/docs/lex%20terra/lex\\_terra\\_issue\\_30.pdf](https://nluassam.ac.in/docs/lex%20terra/lex_terra_issue_30.pdf)

<sup>545</sup> P.S. Sangal, *Indian Legal Environmental Strategy for Sustainable Development*, 51 India Q. (A J. Int'l Aff.) 33 (1995), <https://doi.org/10.1177/097492849505100203>

<sup>546</sup> G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, Sustainable Development Goal 3 (Sept. 25, 2015), <https://undocs.org/A/RES/70/1>

<sup>547</sup> G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, Sustainable Development Goal 13 (Sept. 25, 2015), <https://undocs.org/A/RES/70/1>

<sup>548</sup> G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, Sustainable Development Goal 15 (Sept. 25, 2015), <https://undocs.org/A/RES/70/1>

<sup>549</sup> United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1, ¶¶ 1–59 (Oct. 21, 2015), available at [https://sdgs.un.org/sites/default/files/2020-09/SDGs\\_English.pdf](https://sdgs.un.org/sites/default/files/2020-09/SDGs_English.pdf)

healthy lives for present and future generations. Retrospective ECs, in this light, risk placing India at odds with the ethical imperatives of global environmental governance by diminishing preventive oversight and encouraging regulatory complacency. Global legal scholarship further supports this perspective, noting that environmental liability systems should prioritise deterrence and long-term sustainability over after-the-fact remediation.<sup>550</sup> Thus, aligning domestic environmental jurisprudence with international norms strengthens India's claim to responsible stewardship of the environment and reinforces the normative imperative that environmental law must function as a preventive and anticipatory discipline, not as an instrument of after-the-fact validation.<sup>551</sup>

## V. Way forward

To restore the primacy of preventive environmental governance, it is imperative to reaffirm that ECs must remain a mandatory ex ante condition for all projects that fall under the EIA ambit. Administrative expediency or commercial imperatives cannot usurp the preventive ethos envisioned under the EPA, and the EIA Notification, 2006. Strict adherence to statutory mandates ensures that potential environmental risks are comprehensively assessed and mitigated before projects commence, thereby safeguarding ecological integrity, public health, and the rule of law. Institutional capacity must be enhanced across the MoEFCC<sup>552</sup>, SEIAA<sup>553</sup>, and Expert Appraisal Committees<sup>554</sup>. This entails strengthening technical competencies, legal acumen, and procedural rigor, while digitising monitoring mechanisms to improve transparency, reduce discretionary arbitrariness, and ensure consistency in appraisal processes. Effective

capacity building empowers regulatory institutions to act proactively, detecting environmental threats before they manifest rather than engaging in belated remedial action.

Accountability mechanisms must also be fortified. The polluter pays principle and the doctrine of absolute liability should be operationalised with uncompromising stringency, ensuring that environmental harm carries tangible financial, legal, and operational consequences for project proponents. In exceptional scenarios warranting post facto clearance, judicial supervision must be mandatory, with strict environmental safeguards, enforceable compliance conditions, and transparent reporting. Public participation should be institutionalised through enhanced disclosure mechanisms and participatory grievance redressal, reinforcing democratic oversight and ecological stewardship. Collectively, these measures would reestablish a governance framework in which environmental protection is anticipatory, robust, and aligned with constitutional, statutory, and international obligations.

## VI. Conclusion

Ex post facto ECs are inconsistent with the preventive ethos of India's environmental law and Constitution. Judicial decisions in *M.C. Mehta* and *Vanashakti* affirm that environmental governance must be anticipatory, not retroactive. Articles 14, 21, 48A, and 51A(g) collectively demand that environmental harm be assessed and mitigated before project execution subject to extraordinary circumstances and strict judicial scrutiny. India's environmental jurisprudence must integrate precautionary measures, absolute liability, ecocentrism principles, and the polluter pays doctrine to ensure sustainable development. Moving forward, environmental governance should not seek to regularise violations after the fact but must prioritise proactive oversight, institutional integrity, and protection of ecological and human well-being,

<sup>550</sup> Harvard Law Review Ass'n, *Developments in the Law: International Environmental Law*, 104 Harv. L. Rev. 1484 (1991), available at <https://www.jstor.org/stable/1341598>

<sup>551</sup> *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647 (India)

<sup>552</sup> *Supra* Note 2, at 2

<sup>553</sup> *Supra* Note 3, at 2

<sup>554</sup> Ministry of Environment, Forest and Climate Change (MoEFCC), *Environment Clearance Portal*, <https://environmentclearance.nic.in/> (last visited Dec. 31, 2025)



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achieving a balance between development  
imperatives and environmental stewardship.

