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India's Environmental Impact Assessment: How Development Indicators Govern the Global South

*Shubhangi Agarwalla **

Introduction

On 23 March 2020, India's Ministry of Environment, Forest and Climate Change (the Ministry) issued the controversial Draft Environmental Impact Assessment Notification (EIA 2020) with a deadline for accepting public comments until 11 August 2020. As per a recent amendment to the Environment (Protection) Rules of 1986, the Ministry has 725 days to consider the comments received on the Draft EIA and finalise it. Given this Indian government's history of facilitating the development agenda, and the inane justifications it has been providing in response to public scrutiny of EIA 2020 so far (for example, demands for accessibility in local languages prompted a government response that 'making the EIA available in regional languages might cause translation issues'), the draft looks likely to succeed in its present form.

This is a cause for concern because EIA 2020 is meant to replace the existing EIA notification (EIA 2006). EIA 2020 includes new exemptions, a narrower scope for public consultations, annual monitoring instead of a bi-annual requirement, and it also institutionalises post-facto approvals. It makes a mockery of the concerns raised by environmental organizations, civil society groups and citizens across the country who have written to the Ministry requesting a withdrawal of the Draft but these concerns have been dismissed. In fact, an activist group, Fridays for Future India,

* Student at National Law University, Delhi.

received a notice from the Delhi police under India's Anti-Terror Legislation for 'sending too many emails' to the Environment Minister.

EIA 2020 seems to be part of a broader trend of deregulation of environmental standards and labor protections in India to improve its ranking on the Doing Business Report, and its associated Ease of Doing Business Index, a flagship project of the World Bank.¹ While the Index is formally non-binding, it has considerable ability to shape norms by capturing governance spaces and nudging towards compliance.² The rationale behind this Index is that it provides a benchmark that allows a state to focus on particular 'problem areas' and create new policies to address them. The Indian government has placed much value on the Index, invoking it during election campaigns, and celebrating when the ranking improves.

The Indian government has also started using the ranking as proof of good governance. Prior to Assembly polls in Bihar, Arun Jaitley, the Indian Finance Minister, mocked Nitish Kumar, the Chief Minister of the Indian state of Bihar, for the state's low ranking in the Index: 'Nitishji says let us debate the development issue. What is there to debate? This debate is over. Gujarat [the state that Prime Minister Modi previously governed as Chief Minister] is number one and Bihar stands at twenty-one [out of twenty-nine Indian states].'³ The government has also made it clear that it would like to amend laws that were 'coming in the way' of doing business. The Minister of Environment, Forest and Climate Change has stated that 'his ministry will ensure ease of doing responsible business.'³

Against this backdrop, I will show how intervention by international development institutions using Genuine Progress Indicators, such as the Ease of Doing Business Index, has shaped regulatory behaviour in the global South, notwithstanding international development institutions' lack of mandate over such policies, concerns about the legitimacy of such indicators, and the trade-offs it necessitates. Even though development purportedly helps people across the world achieve a higher quality of life, I understand it here as a project that attempts to universalize a particular way of being that is fixated on economic growth.⁴ Further, it divides the world into developed and developing states and thereby encourages

¹ The World Bank recently paused the Index because of 'data collection and review irregularities.' Unfortunately, the Bank's concerns do not address the challenges raised in this Reflection. Thus, the Index is likely to resume again in this or another guise once such irregularities are addressed.

² Rush Doshi, Judith G. Kelley and Beth A. Simmons, 'The Power of Ranking: The Ease of Doing Business Indicator and Global Regulatory Behavior' (2019) 73 *International Organization* 611.

³ It is perhaps worth noting that the concept of 'responsible business' is central to contemporary corporate social responsibility suggesting an increased corporate involvement in questions of social welfare.

⁴ Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP, 2011); E. Wayne Nafziger, 'From Seers to Sen: The Meaning of Economic Development' in George Mavrotas and Anthony Shorrocks (eds.), *Advancing Development* (Palgrave Macmillan, 2007).

initiatives for the developing to become developed by integrating into the global economy with the help of development institutions. Institutions such as the World Bank and the IMF have sufficient financial resources and clout to be integral to the process of such knowledge creation, which get disguised as 'neutral' and 'fair' representations of the 'emerging' world.⁵ The growth of international development indices over the years has affected the modes of governance in the global South. Neoliberal right-wing governments, such as the Modi government in India, purposely elevate such indices because they serve as ideological tools for the promotion of their political agendas. Thus, we might want to take a step back from grand narratives of development that are masculinist and Eurocentric to recalibrate our energies towards constructing more subaltern and grassroots forms of knowledge and ways of governance.

What Is an Environmental Impact Assessment?

Most states across the world have a legal process akin to the EIA framework to assess the likely environmental consequences of a proposed industrial project. However, the popularity of the EIA framework is not due to any intrinsic benefit of the EIA process or due to efforts from domestic constituents. Instead, the popularity of the EIA framework in developing states in particular is because of pressure from international development banks, notably the World Bank, which make adoption of an EIA framework a prerequisite to get funding for specific projects. For instance, the Rewa Solar Park in Madhya Pradesh, India was only given funding by the World Bank on the condition that a comprehensive EIA was undertaken. Even in cases where the World Bank does not specifically demand EIA legislation, developing states believe that an EIA framework will help them get funding. Even states like Brazil, which initially resisted an EIA framework on the grounds that it was an imperial imposition that thwarts development, ended up adopting the framework once funding became essential.

The Indian EIA framework was brought about in the form of an EIA Notification in 1994, under the Environmental Protection Act 1986 (The Act). The EIA Notification was further amended by Ministerial Notification in 2006. As per the process laid down in the present EIA framework, EIA 2006, including its amendments, executive clarifications and court directions, projects are first screened and then categorised based on the size and scale. Accordingly, projects are issued with a Terms of Reference, based on which the impact assessment is done. This leads to the preparation of a draft EIA Report that is then subject to public consultations that

⁵ Kevin Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry (eds.), *Governance by Indicators: Global Power through Classification and Rankings* (OUP, 2012).

are conducted in close vicinity of the proposed project area and also invites written responses from all plausible stakeholders. This stage is particularly important since it is the only opportunity that subaltern communities have to engage with the impact of the project. The project proponent then addresses the issues raised during the public consultation and drafts the final EIA report. This is appraised by the Expert Appraisal Committee (EAC) in a way that balances 'economic development' and 'environmental concerns'. Thereafter, an environmental clearance is either granted or rejected. If clearance is granted, the EAC lays down conditions to mitigate any problematic impact identified in the EIA process that the project proponent has to comply with. A compliance report that shows that the project is functioning according to these terms must be submitted every 6 months.

EIA 2006 is riddled with its own set of problems. The fact that it is a subordinate legislation, in contrast to an Act of Parliament, is not a coincidence. This makes the EIA process subservient to the whims of the executive. Further, very few projects have ever been rejected. Current clearance trends include wildlife clearance being granted to 16 projects passing through tiger corridors, and allotment of only 10 minutes per project for its appraisal by the EAC. However, instead of improving upon this, EIA 2020 further dilutes environmental protections in India.

What Are the Problems with EIA 2020?

The Draft lays down a six-step process and separate clause for definitions, making it seem like there is an elaborate process of scrutiny in place before a project is approved. However, this needs to be read alongside the range of exemptions and provisos.

Clause 22 of EIA 2020 allows for post-facto clearance for industrial units or projects which have been operating without clearances to get regularized. Environmentalists have been documenting several instances of projects operating without clearances, the most recent example being the May 2020 LG Polymer toxic gas leak that injured over 1000 people as a result of operating without necessary clearances for more than twenty years. Thus, EIA 2020 looks like an important admission from the government that the EIA system suffers from a great number of violations of Indian environmental law. However, what is alarming is that the government has chosen to deal with this by authorising illegality, saying that a violation will be retrospectively tolerated as long as a fine is paid. This negates the purpose of an EIA, which is to ascertain social and environmental risks of a project before it starts; and retrospective approval also makes the entire process of public consultations irrelevant. It also violates the Supreme Court's orders in *Alembic*

Pharmaceuticals Ltd. v Robit Prajapati, where it was held that post-facto approvals are contrary to 'fundamental principles of environmental jurisprudence'.

Moreover, clause 22 of EIA 2020 states that cognizance of violations will be taken in three ways, namely, *suo moto* application of the project proponent, reporting by any government authority, or any violation found during the EIA process by the regulatory authority. Thus, if there is a violation then it has to be reported by the project developer themselves or the government. Neither has an incentive to do so. Further, this is deeply anti-democratic, since concerned citizens, civil society groups and local communities have the right to report violations. Clause 23 of EIA 2020 dilutes the penalties that can be imposed for non-compliance and limits it to the amount of bank guarantee deposited with the State Pollution Control Board. This makes the assessment entirely redundant since companies can usually afford to forfeit this amount.

EIA 2020 has a disproportionate impact on the most marginalized sections of Indian society. There is no provision for the protection of the land of Indigenous communities (Adivasis). Displacement caused by the EIA is likely to have a disproportionate impact on these communities. Tribal areas are on the frontlines of the greed for more resources even though Adivasis and other forest-dwelling communities consider forests to be sacred, have a co-existential relationship with nature, and are also dependent on forest resources for food and livelihood. Thus, displacement is likely to increase their vulnerability, and also induce trauma. Women from these communities are more likely to face violence after being displaced. After years of protests, the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, protect the rights of Adivasi communities by providing for just and fair compensation and making consent for land acquisition mandatory. Further, Panchayats (Extension to the Scheduled Areas) Act makes it mandatory for the government to consult local governments such as panchayats (village councils) before acquiring land for developmental projects. However, nothing has been done to integrate the EIA framework with the current framework of environmental governance in India.

Further, the Draft has not been published in languages other than English or Hindi. Court orders by the Delhi and the Karnataka High Court have been restricted to publishing the draft notification only in India's 22 official languages, which do not include languages spoken by these Indigenous communities. Clause 14 of EIA 2020 read with Appendix 1 reduces the notice period before consultations from 30 days to 20 days without any justification. EIA 2020 also says that in addition to the two components of public consultation in EIA 2006, the public consultation can also be

held through 'any other appropriate mode recommended by the EAC' if the need arises. This is vague and does not specify instances in which the EAC can hold hearings by other means. What this means is that Indigenous communities are now expected to leave their daily means of livelihood, read documents that are mired in jargon, and then come to a public hearing and make lucid comments within 20 days when the Ministry itself has acknowledged the dismal quality of EIA reports and that they are often plagiarized. Such a process makes meaningful assessment impossible.

The final nail in the coffin is the timing – the world is undergoing a global pandemic (and India is under a country-wide lockdown), which has revealed iniquities in the international order including the development project. This pandemic has a zoonotic source and stressing out local ecosystems has a direct correlation to the spread of such diseases. The economic recession caused by the lockdown is likely to result in project managers finding new ways to circumvent environmental measures to earn a quick profit. Yet, the Indian government is pushing for this Draft at a time when we should be focusing on citizens and the environment rather than the short-term interests of corporations. Three farm bills that are meant to liberalise the farming sector are also being pushed through with very anti-democratic tactics. This is the worst possible timing for such horrific measures by neoliberal government elites that are selling our climate, health and food security to the highest bidders.

Why Has the Indian Government Gone Ahead with It Now?

The government's justification is that the EIA 2020 will make it easier to do business. Its rhetoric is one that resonates with specific languages and techniques used by international financial institutions. The Ease of Doing Business Index is released by the World Bank, which measures regulations that directly affect businesses based on ten parameters such as starting a business, enforcing a contract and protection of investors, and in so doing, reveal the 'ease of doing business' in different states. This Index is made from the point of view of foreign investors and not local communities or small local businesses. In fact the International Trade Union Confederation strongly denounced the Index and noted how easy it was to game the rankings by reducing workers' rights.

In making the Index, the World Bank decides what information matters and what outcome is preferred. These are questions that have a tangible impact on the alleged beneficiaries of such an Index (peoples of the global South), yet local viewpoints are not incorporated in an Index that presents itself as neutral and straight forward. Thus, the Index intervenes in the reality of the global South rather than only depicting it. The Index is supposed to be non-legally binding but the World Bank intentionally chose this Index as a benchmark for investors to convey complex and

contextually variable information in a simplified and context-independent way. Its comparative nature pressures governments to introduce corporate-friendly rules and regulations such as simplifying the process of getting a business license for foreign investors. With the help of the Index, the World Bank has been able to justify its 'turn to governance' through the constant expansion of its jurisdiction and surveillance of the global South.⁶ It is worth recalling that in January 2018, the World Bank's chief economist, Paul Romer, acknowledged that World Bank has explicitly manipulated the Index in at least one case (Chile under the Bachelet administration) to downgrade a centre-left government. In fact, at the time of writing this Reflection, publication of the Index has been paused because of data collection and review irregularities. Depending on the results of their audit, it is currently unclear whether and when the Index will be resumed. It is likely the World Bank will either resume or reinvent the Index with little real change in terms of the concerns raised in this Reflection. The suspension is, nevertheless, a good indication of how misguided trust in such indices can be. Hence it is important to re-evaluate the impact these indices have particularly when they nudge governments to reallocate resources and infrastructure away from socially tenable objectives such as infrastructural support for marginalized communities, adequate housing and water supply, and towards avenues that might improve its ranking.

In 2017, the incumbent government blamed India's poor ranking on the opposition party and set a target to improve India's ranking in the Index from 142 to the top 50 by 2020. When India's ranking started improving, popular newspapers such as the Economic Times also made note of the progress that India was making and said 'the ranking comes as a shot in the arm for the Narendra Modi government amid dissenting voices in certain quarters about implementation of the Goods and Services Tax (GST) as well as demonetization'.

Even though the government's focus on the Ease of Doing Business Index has come under scrutiny by domestic scholars, the government has only doubled-down committing to bringing India into the top 30 before the next election in 2024. Several flagship projects such as 'Make in India' were launched solely to this end. Then, with the help of the World Bank, India designed its own state-level Ease of Doing Business Index for its internal performance. The findings from this exercise were then used to shape domestic affairs. The government set up a Project Monitoring Group aiming to fast track approvals for stalled projects which had investments over INR 1000 crore (INR 10,000,000,000). The government also tried to combine forty-four labour laws into four oversimplified codes, which prompted protests by unions across

⁶ Guy Sinclair, *To Reform the World: International Organisations and the Making of Modern States* (OUP, 2017).

the country. This was done to 'reduce the complexity in compliance due to multiplicity of labour laws and thus creating the environment for development of business and industry in the country'.

The Ministry of Environment, Forests and Climate Change for years has considered its role to be one that helps businesses and helps India improve its ranking on the Index. EIA 2020 is not the only measure that the government has taken to improve its ranking. According to a recent report, over 70 per cent of the pollution-causing industries in India have been granted exemption from inspections or clearances. Coastal zone regulations have been relaxed for the benefit of the real estate and tourism sector. This is despite criticisms that the Index either does not take into account labour regulations, social justice concerns or environmental considerations, or when it does, it evaluates them negatively as impediments to 'doing business'. One could say that this is exactly what the Index is meant to do. After all, according to economists of the World Bank itself: 'As in sports, once you start keeping score everyone wants to win'.⁷ As a result, as Kelley and Simmons note, the Ease of Doing Business Index leads the market for accessible rankings of state performance.⁸ However, existing global power inequalities get reinforced in the process.

Conclusion

Indicators such as the Ease of Doing Business Index encourage reform well beyond the World Bank's legal mandate of development financing, encroaching into business regulation by increasing the role of 'experts' and neglecting local knowledge. The line between the political and the technocratic is tenuous and has a bearing on how problems get conceptualized, which experts get chosen, and who produces indicators.⁹ Development indicators today not only produce knowledge but are also a mode of international governance directing policy changes and having adverse consequences for the global South. While the World Bank now seems to acknowledge that the Index is problematic, it is for very different reasons than the ones mentioned in this Reflection. My intention is not to say that the Index should be modified to include environmental concerns. In fact, I believe that such quantification can lead to unintended consequences. Indicators can assume an identity different from what was originally intended. Instead, I believe that we might want to reconsider our obsession

⁷ Simeon Djankov, Darshini Manraj, Caralee McLiesh and Rita Ramalho, 'Doing Business Indicators: Why Aggregate, and How to Do It' (2005) *World Bank Group* as cited in Doshi, Kelley and Simmons (2019) 611.

⁸ Doshi, Kelley and Simmons (2019).

⁹ A similar argument is made by Kerry Rittich in the context of MDGs. Kerry Rittich, 'Governing by Measuring: The Millennium Development Goals in Global Governance' in Ruth Buchanan and Peer Zumbansen (eds.), *Law in Transition* (Bloomsbury, 2010).

with measurement itself and question why we want to use these indicators as proxies for complex problems divorced from any context.