Hypothesizing a New Standard for Environmental Injunctions.

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Abstract

Environmental litigation expands into economic activities that contribute to global warming and promotes inequitable distribution of natural resources. In the context of climate change litigation, international courts have consistently held that governments need to act on climate change and strive towards sustainable development. Courts are expected to act proactively and provide long-term solutions to environmental problems and address climate change impacts by ensuring compliance of legislative norms. Courts exercise discretionary powers when granting injunctive relief that provide a threshold for courts to intervene and guide economic activities of a nation towards sustainable development. Courts need to protect the legislative intent of the executive, preserve fundamental rights of parties not present before the court while preventing any injury to the defending party by protecting their rights under law or in equity. In the absence of statutory prescriptions for testing environmental harm, courts have established standards for granting interim relief, to ensure there is no abuse of powers to grant injunctions and that such orders are not set aside on grounds of abuse of judicial discretion. This paper prescribes a single, uniform and sufficient standard that calls for "Natural Capital" accounting by federal agencies and private businesses that exploit natural resources for commercial purposes.

Keywords: Environmental injunctions; Natural capital; Natural Capital accounting; Injunctive relief; Precautionary principle

Introduction

Environmental litigation was a movement started by socially conscious citizens, who, with increasing knowledge and awareness on environmental issues, believed that economic development of a nation should be intrinsically linked to sustainable and optimal allocation of its natural resources. Environmental litigation is expected to serve citizens in the most economically efficient manner that minimizes negative impacts of business activities, reduces waste generation and increases resource efficiency. Forms of imbalance in the management and distribution of natural resources can be addressed through environmental litigation that complement already existing state actions on enforcement and compliance of statutory norms by private and public entities. The recent extension of environmental litigation into climate change is essentially a call for action by governments on climate change, a contentious topic that political question doctrine could well insulate. Political question doctrine disables courts' authority on deciding issues that are within the purview of the executive and the legislature and are not entirely justiciable. There are no judicial grounds to dismiss cases on natural resource management

and climate change on grounds of the political question doctrine. Litigation pertaining to the environment is aimed at propelling economic growth at the micro-level by pushing businesses to adopt sustainable business practices. Courts are expected to provide long-term solutions to environmental problems that eventually tackle climate change impacts by enforcing legislative norms.

This paper discusses at length the various standards applied by the courts in the United States in preliminary injunction pleas under National Environmental Policy Act (NEPA) and related laws. It discusses the reasoning behind the call for a uniform federal standard in deciding pleas for preliminary injunctions, with the discourse placing more emphasis on environmental injunctions. It relies upon the pioneering work accomplished in the area of jurisprudence of environmental injunctions and takes it up for extensive discussion on standards that federal and state courts apply in hearing environmental injunctions. The judicial review of some of the landmark cases in the United States is debated at length to establish the inconsistency and ambiguity in the application of standards by the courts of the United States. This paper hypothesizes the usage of a universal standard in preliminary injunction pleas and expounds the theory as to how it can serve as a tool to courts in addressing climate change and sustainable development while hearing cases relating to environment protection and natural resources management.

Injunctions

Court orders that command the nonmovant or the defendant to do or abstain from doing a particular action, primarily to impede the incidence of a threatened wrong and prevent future violations amounts to granting an injunctions. Injunctive relief is granted when courts exercise their discretionary powers under equity jurisdiction by protecting the legislative intent of the executive and preserving the fundamental rights of those other parties not present before the court and effectively takes care of the public interest factor. The first principle of injunction law is that one does not obtain an injunction to restrain actionable wrongs for which an award of damages is the proper remedy. Similarly, injunctions shall not be granted in case of non-existence of a legal injury or when the plaintiff alleges a mere inconvenience, harassment on a frivolous note and when the remedy lies in the hands of the Plaintiff. “The interlocutory injunction is merely provisional in its nature, and does not conclude a right. The effect and object of the interlocutory injunction is merely

to preserve the property in dispute in status quo until the hearing or further order."[1]

Preliminary injunctions are equitable remedies issued after an initial hearing by giving notice to the defending party and are effective *pendente lite.* Such orders prevent injury to the defending party and protect the parties' rights under prevailing law or equity. It is issued on the premise that the plaintiff has established a *prima facie* case against the defendant and concluding that matter in dispute requires a detailed enquiry for a permanent injunction. Preliminary injunction orders preserve the *status quo* on the relative positions of the parties until a full trial is conducted on the merits of the case to determine the existence of a right by hearing at length on substantial questions of fact or law.

A preliminary injunction is available in the absence of an adequate legal remedy. The adequate remedy test has been expounded in forms that differ as to what burden the plaintiff must meet: it must be shown that he has exhausted his remedies at law; that "the refusal of a court of equity to interpose would, from the insufficiency of legal relief, or the imperfection of the legal procedure, work a substantial injustice to the litigant party under all the facts of the case", or merely that the remedy at law is not as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity."[2]

Preliminary orders seek to preserve the *status quo* that equity would not disturb; balancing of the hardships and the probabilities of success on merits will dictate that the *status quo* should not be disturbed by the preliminary injunctions.[3] The concept of *status quo* lacks sufficient stability to provide a satisfactory foundation for judicial reasoning. The better course is to consider directly how best to preserve or create a state of affairs in which effective relief can be awarded to either party at the conclusion of the trial.[4]

Law relating to interlocutory injunctive relief is common law based on procedural rules that are presently insufficient to deal with the complexity in protecting the environment and tackling climate change. A motion for a preliminary injunction is a common recourse taken by environmental plaintiffs to prevent imminent and irreparable injury to the plaintiff and the environment due to actions of the defendants. Presently, courts are moving away from

[1]Kerr, W. W. (1889). A Treatise on the Law and Practice of Injunctions. Blackstone Publishing Company.
[2]Developments in the Law: Injunctions. (1965). Harvard Law Review, 78(5) at 997, 998
[3]Id. at 1057
[4]Id.

issuing automatic injunctions except on proof of blatant violations of statutory provisions.

In the absence of statutory prescriptions for testing environmental harm, courts have established standards for granting interlocutory injunctive relief, as a means to ensure that there is no abuse of discretionary power. The courts apply these standards for granting interlocutory relief in the belief that valid and speaking orders cannot be set aside on the grounds of abuse of judicial discretion, although there is no clarity on the standard for exercise of that discretion. When these standards are applied on a case to case basis, there emerges varying degrees of risk to parties and varying levels of urgency demonstrated by the parties during the hearing that indicates discordance among courts on applying unclear standards. The courts generally ascertain if the plaintiff has an adequate remedy at law and has a reasonable chance of succeeding on merits, whether the plaintiff will suffer irreparable harm if the injunction is denied, whether the defendant will suffer irreparable injury and legal rights violated if injunction is actually granted. Finally, the court makes a finding on the impact of injunction on the public interest factor by taking into account the interests of non-parties to the injunction plea. In any case, the courts do not expect to establish all factors during the preliminary hearing but adopt a sliding scale approach by weighing the potential harm to the parties taking into consideration the public interest factor.

Under the Federal Rule of Civil Procedure 65 of the United States neither lists out the circumstances in which a preliminary injunction may be granted nor guidelines for obtaining an injunction. The rules do not confer subject-matter or personal jurisdiction on the court. Therefore the decision falls entirely within the discretionary power exercised by the Court. Courts grant a preliminary injunction to maintain the *status quo* on the relative positions of the parties, emphasizing on the court's authority to render a speaking order and minimizing the risk of error that may jeopardize the legal rights of the parties. The Supreme Court of the United States is yet to articulate a consistent standard for granting or denying preliminary injunction. This has led to adoption of and varying standards by the lower courts. It further cautions district court to apply a stringent standard in deciding in favour of the plaintiff's motion for preliminary injunction by weighing carefully the interests of both the parties concerned. Since there is no standardized formula, a party seeking a preliminary injunction in the federal courts must demonstrate irreparable injury and insufficient legal remedies available otherwise.

In such situations, several Circuit Courts apply a traditional four-part standard:

a) *Whether the plaintiff will probably succeed on the merits;*
b) *Whether irreparable harm to the plaintiff would result if the injunction is not granted;*
c) *The balance of harms between the plaintiff and defendant if the injunction is allowed; and*
d) *Whether the injunction will have an impact on the public interest*.[5]

Factors of Inconsistency and Ambiguity

Professor *Leubsdorf* in his pioneering article[6] states that the absence of rationale for the standard governing interlocutory injunctions has created confusion in formulations of the standard among the contemporary courts. He finds the rationale for the standard in the need to minimize irreparable loss of legal rights during the pendency of litigation. He calls for application of a test that balances the irreparable harm to a party against the possibility of a judicial error in either granting or denying an injunction. According to him, the court need not consider every harm resulting from judicial error, but should prevent the harm that a final relief cannot redress. His suggestion that courts can minimize the probable loss by "making two inquiries". First of which calls for appraisal by the court on the likelihood of various views of the facts and the law that may prevail at the trial and an assessment of probable loss of rights to each party if it acts on any particular view that may ultimately prove to be erroneous. His proposed model for preliminary injunction calls the due process standard defining the procedures to be followed when a defendant is deprived of a right prior to a full hearing on the matter. He takes into account the Supreme Court's view that the defendant should not be subjected to unwarranted deprivations or there must be no indefinite postponement of his rights. His model aims to minimize the irreparable injury or loss of rights to the parties but lays emphasis on the assessment that if the plaintiff's injury can be prevented only by risking injury to the defendant, the standard then turns to the plaintiff's probability of success on the merits.

He centers his arguments on the idea that environmental statutes are meant to protect the public from the cascading effects of statutory violations and therefore it is imminent on the part of the court to conclude that a violator is

[5]Morton Denlow, The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard, 22 REV.LITIG. 495 at 497,498 (2003)
[6]Leubsdorf, J. (1978). The Standard for Preliminary Injunctions. Harvard Law Review, 525-566.

causing irreparable injury. He furthers his argument by stating that enjoining a party on the basis of an irrebuttable presumption of irreparable injury without a full hearing may deprive a defendant of his legal rights and can violate the due process clause.[7]

In deciding pleas brought in by the government under environmental law statutes, courts tend to apply completely variant forms of standards on the presumption that such suits may involve public interest or public policy and that eventually there may be a likelihood of mass injury. In such cases, the judiciary tends to defer to governmental agencies. The author states "Without a clear statutory warrant, however, deference should not extend to the assessment of irreparable injury."[8] Since the agency's decision to sue is most likely based on harms that must be weighed by the court, judicial deference to the agency's decision would lead to a double counting of those harms. As a litigant, agencies should make a complete disclosure of facts and reasons that prompted the motion for preliminary injunction and the courts are expected to extend substantial deference to the same. Courts need to distinguish between the preliminary injunction standard and the substantive rights of the plaintiff emanating from a statutory rule that ultimately implements policies underlying substantive law.[9]

According to Professor *Leubsdorf* "Plaintiffs could be given a right to immediate relief in a class of cases where (1) the denial of relief is much more likely to undermine relevant policies than the injunction, (2) a special preliminary test is more likely to avoid this danger than the usual standard and easier to apply, and (3) that test will not unduly stimulate strike suits and delaying tactics."[10] In conclusion the author states that the current standard validates the need to prevent irreparable injury to legal rights which may erupt at the time of the final hearing . As a result, the relationship between the elements of the standard remains obscure and inconsistent in its application by the courts.[11]

Professor *Leubsdorf*'s model posits the purpose of a preliminary injunction as a means to minimize probable irreparable loss of rights of parties caused by judicial errors. The serious flaw in application of standards by courts granting injunctive relief is the obvious "lack of well-articulated rationale."[12]

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[7]Id. at 562
[8]Id. at 563
[9]Id. at 564
[10]Id. at 565
[11]Id. at 565, 566.
[12]Id.

Fundamentally, if the courts do not grant prompt relief, the plaintiff may suffer a loss of lawful rights that no future remedy can possibly restore. But if the court does grant immediate relief, the defendant may similarly sustain equivalent loss of rights.[13] Professor *Leubsdorf* opines that the source of this dilemma is the element of uncertainty that sets in while courts hear injunction pleas and that "the court's interlocutory assessment of the parties' underlying rights is fallible in the sense that it may be different from the decision that ultimately will be reached…..The court need not consider all irreparable harm that may be inflicted upon the parties, but only irreparable harm to their legal rights."[14] The aim is to isolate such cases where granting or denying relief under specified tests will minimize harm to public policies and prevent irreparable injury to parties' legal rights.[15]

Judge Richard Posner, who was then the Chief Judge of the Seventh Circuit Court, amplified *Leubsdorf's* model by expanding its scope in his decision for *American Hospital Supply v. Hospital Products Limited.*[16] Judge *Posner* explains that "a district judge asked to decide whether to grant or deny a preliminary injunction must choose the course of action that will minimize the costs of being mistaken." *Posner* formalized *Leubsdorf* model by addressing the trial court's decision as follows:

> *"Grant the preliminary injunction if but only if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denied would be an error, exceeds the harm to the defendant if the injunction is granted, multiplied by the probability that granting the injunction would be an error."*

As in *Roland Machinery Co. v. Dresser Industries, Inc*., (749 F.2d 380, 382-88) (7th Cir. 1984), Judge Posner states that the scope for judicial review of a district court's order to grant or deny preliminary injunction is limited and is reversed only if there is a latent 'abuse of discretion'.[17]

Authors *Richard Brooks and Warren Schwartz*, in their Article[18] stated that preliminary injunction orders needed to promote efficient conduct by the

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[13]Id.
[14]Id.
[15]Id. at 565
[16]780 F.2d 589 (7th Cir.1986)
[17]Id. at 593
[18]Richard R.W.Brooks & Warren F.Schwartz, Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine, 58, Stan L.Rev.381 (2005).

parties. The authors discuss what is called as "*Leubsdorf-Posner*"[19] formulation for preliminary injunctions as described by Professor *Leubsdorf.*[20] According to them courts, conventionally consider preliminary awards only if adequate compensatory remedies are unavailable under circumstances of uncertain legal entitlements.[21] According to them:

"*When rights are uncertain, parties appreciate the full benefits of their conduct, but they discount harm to others of this conduct by the likelihood that they possess a legal entitlement to so act. Hence individual incentives to behave efficiently are distorted by uncertain legal entitlements".....Preliminary injunctions "correct this distortion" by awarding in terrorem damages that the defendant will be required to pay if an injunction is granted and violates it, and reimbursement of compliance costs if defendant prevails at the end of litigation. when the plaintiff decides to pursue the injunction….Preliminary injunction doctrine takes the conduct decision out of the hands of the biased defendant and places it in the hands of plaintiff who, by design, faces the marginal costs and benefits of the decision."*[22]

According to the proponents of the preliminary injunction doctrine, legal entitlements and their assignments need to be protected before an order concluding the litigation on merits is issued. Any award of adequate damages at the conclusion of the case makes the entitlement holder whole and encourages efficient allocation of resources. The most prominent expression of this claim is the so-called "efficient breach hypotheses."[23] This effectively means "The duty to keep a contract at common law means… you must pay damages if you do not keep it, - and nothing else."[24] The doctrine recognizes the code that we cannot postpone protecting legal entitlements until the conclusion of the litigation concerning the assignment of those entitlements and efficient allocation of resources. *Judge Posner* argues that the availability of an adequate final remedy is not sufficient justification for denying preliminary injunctions and that an adequate award of monetary compensation at the end of the trial does not provide sufficient incentive for parties to engage in efficient conduct pending litigation.[25]

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[19] See Judge Richard Posner's opinion in *American Hospital Supply Corp. v. Hospital products Ltd* and from *Leubsdorf*, supra note 3.
[20]See supra note 3.
[21]see supra note 16 at 382.
[22]Id.
[23]Id. at 384.
[24]Id. at 384.
[25]Id. at 385.

"Liability rules encourage parties to weigh the costs of avoiding liability – through performance or non-performance – against the costs of facing liability."[26] Essentially, the Judge Posner claims that when a party is expected to compensate the injured party by its conduct, internalizes the cost of paying the injured party and estimates that the benefits of engaging in such a conduct far exceed the aggregate costs.[27] Liability rules often do not preserve parties' incentives to engage in efficient conduct when there is an element of legal uncertainty with regard to the rights of the parties.[28]

Posner adopted *Leubsdorf's* formulation for standards which clarify the objective in issuing such interim orders. The authors elucidate *Leubsdorf*'s postulate "the preliminary injunction should be granted if the product of the probability that plaintiff will prevail and the amount of uncompensated harm the plaintiff will suffer during the pendency of the litigation is greater than the product of the probability that defendant will prevail and defendant's uncompensated costs of complying with the injunction."[29]

The Authors illustrate *Leubsdorf's* rule in a more lucid manner by providing a simple numerical example. "If plaintiff has a 60% chance of prevailing at the conclusion of the case and will suffer $1000 in damages during the pendency of the case which cannot be remedied by an eventual award of damages, plaintiff's expected irreparable loss from not being granted the injunction is $600. If the plaintiff has a 60% chance of prevailing, then the defendant has a 40% chance of prevailing. If defendant's costs of complying with the injunction are $2000 and defendant will not be compensated for any of these costs at the end of litigation, defendant's expected irreparable loss if the injunction is granted exceeds the $600 expected irreparable loss that plaintiff will suffer if the injunction is not granted, the injunction should not be granted under this framework." *Judge Richard Posner* while adopting the *Leubsdorf* framework,[30] concluded that underlying the apparently inconsistent formulations is an effort to minimize judicial errors including the error of denying an injunction to one who will prevail on merits, and the error of granting an injunction to one who will not be able to establish his legal right. These "error costs" can be minimized, as explained by Professor *Leubsdorf*, that by comparing the product of the probability of plaintiff's success and the would-be uncompensated harm to plaintiff with the product of the probability

[26]Id.
[27]Id.
[28]Id.
[29]Id.390.
[30] See supra note 6.

of defendant's success and defendants would be uncompensated costs of complying with the injunction."[31]

The *Leubsdorf-Posner* view is not settled law but is followed by the state of Massachusetts. The *Leubsdorf-Posner* rule governing the issuance of a preliminary injunction is designed to minimize the expected costs resulting from an erroneous grant of the entitlement. "From an incentive-oriented view, the relevance of uncertainty is that it may make it impossible for the grant of damages at the conclusion of the case to ensure efficient conduct by the defendant." Further, the rule governing the issuance of a preliminary injunction is "designed to minimize the expected costs resulting from an erroneous grant of the entitlement."[32] The authors claim that the "grant or denial of a preliminary injunction induces inefficient behavior, then a social loss occurs – a loss which cannot be undone by a subsequent transfer of money from one party to another."[33] They suggest, "*ex post* compensation is never adequate by itself because it cannot eliminate the social loss resulting from the inefficient conduct." The authors state that courts can issue a preliminary injunction if the plaintiff is prepared to assume liability for defendant's compliance costs if defendant prevails at the conclusion of the case.[34]

The authors discuss what is known as '*the interim-efficiency*' rule in which the courts address the question whether the plaintiff seeks to compel efficient conduct of the defendant without giving any consideration to any irreparable harm to legal rights or the distribution of costs of performance. Under the rule, the plaintiff can compel the defendant if she is able to demonstrate that it is allocatively efficient for the defendant to do so. While applying this rule, the court does not compare irreparable injuries, but rather decides whether the plaintiff's payoff from interlocutory relief exceeds the defendant's payoff from the court's denial to grant the relief.[35] The authors claim that the costs of implementing the interim-efficiency rule is almost the same as implementing the *Leubsdorf-Posner* rule.

Subsequent to the analysis offered by authors *Richard Brooks and Warren Schwartz* in the article[36] Professor *Leubsdorf* counters their articulation in his

[31]See supra note 16 at 391.
[32]Id. at 392.
[33]Id. at 393.
[34]Id. at 394.
[35]Id. at 403.
[36] See supra note 16.

rejoinder of an article[37] by defending a more traditional approach requiring consideration of the merits of the plaintiff's case and the irreparable injury to the rights of the parties that granting or denying preliminary relief would inflict. [38] In his article, Professor *Leubsdorf* concludes that courts have rarely applied the *Leubsdorf-Posner* rule and invariably do not attempt to make a comparison of the ability of parties to profit from the resources in dispute during the pendency of litigation.Further, the courts do not issue an injunction to any "nonfrivolous" plaintiff who is willing to post a bond and have more often denied any interlocutory relief.[39] He concludes that despite suggestions for new standards for preliminary injunctions, it remains unclear if they would aid in promoting efficient use of resources during pendency of litigation.[40] It would be ideal to protect the legal rights of the parties by designing injunction orders in a manner that minimizes the likelihood of irreparable harm to such rights.[41] Injunctions based on statutory violations most often are denied on the technical plea that the violation is only technical rather than substantial and injunctive relief is not remedy for merely procedural non-compliance.[42] In his conclusion the author reminds us that Congress' mandate prevents the courts from balancing equities in the absence of substantial procedural violation and proceeds to grant a preliminary injunction and if the courts ignore the mandate, they would step into the shoes of the federal agency violating the separation of powers doctrine.[43] If the party demonstrates substantial statutory violation and irreparable harm is established, the public interest factor as embedded in the statute needs to be protected by granting injunctive relief.[44]

The Supreme Court has opined that courts exercising equity jurisdiction should "go much farther both to give and withhold relief in furtherance of the public interest than when only private interests are involved."[45] Generally, courts hearing environmental cases have been consistent in the finding that statutes on environmental protection have a strong and inherent public interest factor although it is most often difficult to isolate and evaluate the irreparable harms that are of public concern. Environmental protection is statutory in

[37]Leubsdorf, J. (2007). Preliminary Injunctions: In Defense of the Merits. *Fordham L. Rev.*, *76*, 33.
[38] Id at 33.
[39] Id. at 47.
[40] Id.
[41]Id.
[42] Don J. Frost Jr., Preliminary Injunctions as Relief for Substantial Procedural Violations of Environmental Statutes: Amoco Production Co. v. Village of Gambell, 4 Alaska Law Review 105-152 (1987) at 108
[43] Id. at 147
[44] Id. at 148
[45] Yakus v. United States 321 U.S. 414, 440-41 (1944)

practice and environmental enforcement is rigid and clear in its dealing with offenders and violators. Yet courts have often been confused on the reconciliation of tradition of equitable discretion with such stringent statutory norms that call for substantial violation of statutory provisions and enforcement regulations.

Contemporary Jurisprudence

The Supreme Court of the United States held the premise that a federal judge "is not mechanically obligated to grant an injunction for every violation of law." The Court, although held that an injunction was mandatory to enforce the provisions of the Endangered Species Act and has established that the judicial role in environmental injunction cases is to implement the congressional objective.

The Supreme Court of the United States in *Tennessee Valley Authority v. Hill*[46] ruled that courts must issue injunctions for every violation of Section 7 of the Endangered Species Act, without any inquiry into the "wisdom or unwisdom" of doing so. There the Court held that the right to an injunction was an extraordinary remedy that is not absolute and that it may be issued immediately on the notice of a statutory violation and would be made available to parties who have been successful in establishing a *prima facie* case of an irreparable injury that cannot be compensated by award of damages. When courts find that an award of damages is sufficient and meets the redressability requirement, injunctions are invariably never granted. In the absence of specific statutory violation or on failure to prove irremediable harm as per the balancing of harms test, courts deny injunctive relief.

On several occasions, the Supreme Court has denied injunctive relief entirely on equity considerations. In *Weinberger v. Romero-Barcelo*[47] the Court noted the limits Congress may place on a court's equitable discretion but cautioned that the Court should not "lightly assume that Congress has intended to depart from established principles," including the principle that a court is not "mechanically obligated to grant an injunction for every violation of law." It further stated "an injunction should issue only where the intervention of a court of equity is essential in order to effectively protect property rights against injuries otherwise irremediable. The Court further described the requested remedy, a preliminary injunction, in terms of "commonplace considerations."[48] Courts in United States when dealing with statutory violations, similar to

[46] 437 U.S. 153 (1982)
[47]456 U.S.305 at 307 (1982)
[48]Id. at 312,313

NEPA violations, issue automatic injunctions using a three-pronged test; a) whether the statute expressly prohibits certain conduct that would allow a violation to continue unabated absent an injunction; b) whether the purpose of a statute aims to prevent that conduct; and c) whether the statute lacks other remedies for curing improper conduct.[49] In dealing with statutory violations the court[50] relied on the "plain intention of the Congress to halt species extinction, at whatever cost, since the value of this "genetic heritage is quite literally, incalculable and irreparable damage."[51]

Similarly, under Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act, (CERCLA) authorizing all relief "necessary to abate" a danger or threat or release of a hazardous substance has been found broad enough to authorize issuance of an injunction to prevent the operator of a hazardous waste facility from interfering with an EPA approved remedy without a showing of irreparable harm.[52]Courts also have rejected the argument that all statutory violations predetermine the issue of injunctions as seen in *Weinberger*, where the Supreme Court held that when the Clean Water Act provides civil and criminal penalties to remedy violations, it is not necessary to interpret the statute as requiring injunctive relief. NEPA lacked the kind of penalty provisions unlike other environmental statutes and therefore violations under the statute warranted injunctive relief. In *Monsanto v. Geerston Seed Farms*,[53] The Supreme Court refused a plea for permanent injunction on the ground that there was no irreparable injury to the environment, dismissing the application on that factor alone without getting into the merits of the other three factors. The court deterred from granting automatic injunctions for environmental harms by requiring judges to, instead, follow a balancing test to determine whether an injunction should remedy a statutory violation like that of a NEPA violation. The *Monsanto* four-part test requires a plaintiff to demonstrate:

a) *That it has suffered an irreparable injury;*
b) *That remedies available at law, such as monetary damages, are inadequate to compensate for that injury;*
c) *That, considering the balance of hardships between the plaintiff and the defendant, a remedy in equity is warranted and*

[49]Sarah W.Rubenstein, Injunctions under NEPA after Weinberger v.Romero – Barcelo and Amoco Production co. v. Village of Gambell, 5 Wis. ENVTL. L.J. 1, 7 (1998).
[50] See supra note 46
[51]Id. at 173
[52]B.F.Goodrich Co. v. Murtha, 697, F.Supp.89 (D.Conn.1988)
[53]130 S.Ct.2743 (2010)

d) *That the public interest would not be disserved by a permanent injunction.*[54]

Environmental cases require courts to determine the presence of "irreparable injury" factor by distinguishing injury to environment and injury to the plaintiff's interests like protecting his aesthetic, recreational, or conservationist interest. Courts need to analyse irreparable and irremediable harm caused to the environment by activities of the defendant who stood to profit by continuing with business activities that could have a long lasting debilitating impact on the environment. In *New York v. Nuclear Regulatory Commission,*[55] the court stated that the plaintiff has a great difficulty in demonstrating irreparable harm, which is often referred to as the "*sine qua non*" of interlocutory relief.[56] The court declared that the "alleged threats of irreparable harm" must be "actual and imminent, and not remote or speculative.[57] The court further indicated two bases for "determining irreparable harm":

a) *The action sought to be enjoined would have produced an irreversible and irretrievable commitment of resources that would have made it virtually certain that a missing…..environmental impact statement, even if eventually completed, would never serve the purpose it was intended to serve….*
b) *The action sought to be enjoined necessarily would have caused immediate, demonstrable and irreparable damage to the environment.*[58]

The Supreme Court as a final verdict on the issues surrounding environmental injunctions declared that "attention must be shifted away from the "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence"[59]

When the government makes an "irreversible commitment of resources" without appropriate and adequate preparation of environmental impact assessment, such an action constitutes irreparable injury.[60] In granting injunctive relief on the basis of economic injury constituting irreparable harm, the court needs to determine whether an injunction order affects an entire industry or just one single unit of an industry. The court also makes an assessment whether complying with the injunction order reduces the

[54]Id.at 2756
[55]550 F.2d 745, 753 (2d Cir.1977)
[56]Id.
[57]Id. at 755
[58]Id. at 756
[59] City of Milwaukee v. Illinois 451 U.S. 304 (1981)
[60]New York v. Kleppe 429 U.S. 1307 (1976)

competitive advantage of the defendant against other similarly placed parties. With regard to harm to the defendant factor, the Supreme Court cited "evidence of harm to defendants' business ventures in denying a permanent injunction."[61]

The following extract provides an insight into what constitutes irreparable harm:

"A man, who seeks the aid of the court by way of interlocutory injunction, must, as a rule, be able to satisfy the court that its interference is necessary to protect him from the species of injury which the Court calls irreparable, before the legal right can be established upon trial. By the term "irreparable injury" it is not meant that there must be no physical possibility of repairing the injury; all that is meant is, that the injury would be a material one, and one which could not be adequately remedied by damages and by the term "the inadequacy of the remedy by damages" is meant that the remedy by damages is not such a compensation as will in effect, though not in species, place the parties in the position in which they formerly stood. If the act complained of threatens to destroy the subject-matter in question, the case may come within the principle, even though the damages may be capable of being accurately measured. The fact that the amount of damage cannot be accurately ascertained may constitute irreparable damage; but although the amount of damage may be difficult to ascertain, a man who has on a previous occasion compromised his rights against other parties by accepting a sum of money, may preclude himself from saying that the damage is irreparable and cannot be compensated by money."[62]

Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favour the issuance of an injunction to protect the environment.[63] The Supreme Court has held that even where there is a strong likelihood of prevailing on the merits, the plaintiff must demonstrate at least a likelihood of irreparable harm.

The public interest factor plays a critical role in determining the outcome of certain environmental cases and dealing with applications for injunctive relief. The court while hearing *The Lands Council v. McNair*[64] in keeping with the decision of *Amoco Production Company*, held that "the public interest in preserving nature and avoiding irreparable environmental injury outweighs

[61]Kleppe v.Sierra Club 427 U.S. 390 (1976)
[62]See Supra note 1 at 17, 18.
[63]Amoco Production v. Village of Gambell, 480 U.S. 531.
[64]537 F.3d 981 (9th Circuit 2008)

economic concerns in cases where plaintiffs were likely to succeed on the merits of their underlying claim." Courts have recognized the public interest in consideration of environmental impacts of major federal projects and have held that suspending such large-scale infrastructure projects until that consideration occurs "comports with public interest".[65] The public interest standard can be two fold. The first aspect of the factor relates to protecting the environment against industry practices and the other aspect relates to the economic value the industry itself generates for the benefit of the society.[66]

When time is of the essence and the litigation relates to an infrastructure project commissioned to promote economic development, courts cannot afford to restrain a party and defer interminably, the final hearing on merits. When plaintiffs seek to enjoin future investments in an environmentally harmful project on the plea that the project would destroy a distinct, finite and tangible resource, the courts may be willing to grant an injunction solely on the basis of irreparable injury to the environment. The court's dilemma begins when the plaintiff approaches the court after substantial investments have been infused into a project. In such cases, courts seek to enjoin only such activities which have a direct impact on the environment and direct the party to seek alternatives and minimize such negative outcomes. In the absence of such direct impact the court tends to monitor the entire conduct which "may significantly or irreparably alter the natural environment" in the project area.[67]

Debating a Uniform Standard

The problems due to lack of a uniform standard for granting environmental injunctions include inconsistent and inequitable decisions. A uniform standard should define the elements necessary for obtaining a preliminary injunction that is beyond blatant violation of statutes or regulations and provide guidance as to how the standard should apply when courts exercise their discretionary power and balance the equities.

One of the most convincing arguments in favour of establishing a uniform standard in deciding preliminary injunctions applications started with the following question: "What is the critical component of the case that requires the grant of injunction between the time the preliminary injunction can be decided and the time an actual trial on the merits can take place that cannot be satisfied by proceeding to a trial on the merits? Unless the critical component is just that - irreparable harm that cannot be remedied following a trial on the

[65]South Fork Band Council v. U.S. Dept. of Interior 588 F.3d 718 (9th Circuit 2009)
[66]Minnesota PIRG v. Butz 358 F.Supp.584 at 625 (D. Minn. 1973)
[67]Ohio v. Callaway, 497 F.2d 1235, 1241.

merits – the court should not proceed with the preliminary injunction hearing. Courts should actively discourage preliminary injunction notions and encourage parties to proceed expeditiously to trial on crucial issues."[68]

In applying a uniform standard for preliminary injunctions and expediting the trial on merits, parties can save costs and obtain better and timely feasible solutions for environment protection. Many scholars have highlighted the need for a uniform standard to be adopted in granting preliminary injunctions in environmental litigation. Establishing a uniform standard requires stretching the discretionary powers of courts empowering them to:

a) *order multiple injunctions, including freezing injunctions against defendants who fail to comply with statutory norms or earlier court orders;*
b) *design an order that works as a continuing mandamus;*
c) *call for an evidentiary hearing and consolidation of the hearing of trial on the merits of the case; and finally,*
d) *pass a speaking order that lists out all conclusions on facts and law making any further review or appeal difficult.*

A workable standard should embody at least four features. First, it should encourage purposeful argument and deliberation by the court and the parties…..Second, the standard should attempt to equalize power between the parties, allowing them to present their best case. Third, the standard should promote clarity and candour, both in arguments and decisions. Finally, it should be easy to use…. A good standard, however, should focus argument on the facts and law of the case rather than on the choice of a particular standard or the meaning of terms within it…In short, a standard should generate the maximum amount of relevant information possible and focus the attention of the court and the parties.[69]

The Precautionary Principle is the fulcrum on which a new standard can be evolved. The Rio Declaration on Environment and Development principle

[68]See supra note 2 at 537.
[69] Vaughn, L. B. (1989). A Need for Clarity: Toward a New Standard for Preliminary Injunctions. *Or. L. Rev.*, *68*, 839.

states “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” In this case, courts need not attempt to understand the irreparable harm factor in the most scientific manner possible before issuing an preliminary injunction. It would suffice to show that preliminary consequences of an activity touches upon the basic principles of environment protection and natural resources management and can ultimately cause environmental degradation and irremediable harm to the environment. Essentially, the precautionary principle stands for the proposition that when there is a threat of environmental harm, lack of scientific certainty regarding the risk should not be used as a reason to justify failure to take cost-effective precautionary measures.

The Precautionary Principle is fundamental to implementing sustainability as a matter of protection and preservation of natural resources. Essentially, the court examining a plea for injunction should examine application of the precautionary principle by the defendant. Precautionary approach is a reliable and viable response to the factor of legal and scientific uncertainty. An element common to various formulations of the precautionary principle is the recognition that lack of certainty regarding the threat of environmental harm should not be used as an excuse for not taking action to avert that threat (International Union for Conservation of Nature). Courts, therefore, need not explore the uncertainty factor of environmental damage by attempting to establish a causal link between an activity and environmental damage. It can assess whether the defendant has initiated precautionary measures that are sufficiently preventive to avoid irreversible harm. The Earth Charter, para 6, on Ecological harm states “Prevent harm is the best method of environmental protection and, when knowledge is limited, apply a precautionary approach. It further calls for “action to avoid the possibility of serious or irreversible environmental harm even when scientific knowledge is incomplete or inconclusive. It places the burden of proof on the party claiming absence of significant harm and applying the standard of Precautionary Principle, the Charter calls for decision making that addresses the cumulative, long-term, indirect, long distance, and global consequences of human activities.

The application of the principle by the courts calls for best information being made available for consideration including scientific information that includes traditional and indigenous knowledge and practices that may be relevant. “Such information should be independent, free of any bias and assimilated in the most transparent manner by publicly accountable institutions without any conflict of interest” (International Union for Conservation of Nature-IUCN)).

The application of principle helps consideration of social and economic costs and benefits of an existing or proposed threatening activity that can accrue only to a few, or only to the already powerful and economically advantaged, or are only short-term and potential costs are borne by the public and communities, by poorer or vulnerable groups, or over the long-term calling for increased precaution by project proponents.

The Precautionary Principle recognizes that delaying action until there is compelling evidence of harm will often mean that it could lead to irremediable damage or could become impossible to avert irreparable harm to the resource. The Principle is based on the recognition that a false prediction that a human activity will not result in significant environmental harm will typically be more harmful to society than a false prediction that it will result in significant environmental harm (IUCN). Its presence in all major international agreements including the United Nations Framework Convention for Climate Change (UNFCCC) in one form or another is proof of its efficacy as a major tool in tackling climate change.

When the precautionary principle is applied, the result could be strict prohibition of such activities that pose a threat to environmental integrity of a region, which means granting injunctive relief to the movant may be easier in the face of legal and scientific uncertainty, thus calling for strict liability that serves as a deterrent to harmful activities.

The principle includes three elements: “fully assessing possible impacts; of an action, shifting the burden of proof to those whose activities pose a threat to the environment, and not acting if there is significant uncertainty or risk of irreversible harm”. The first two elements are procedural, and the third is a substantive one. The first element, environmental impact assessment, enables but does not guarantee protection or caution.[70] The second element of the precautionary principle, the burden of proof, to affect the level of precaution in environmental decision-making: (1) mandating which party has the burden of proof, and (2) establishing what level of proof is required. The least precautionary rule would be one that placed the burden of proof on the party opposed to a proposed action and required scientific certainty in order to satisfy that burden. The most protective rule would require the same level of proof but place the burden on the party proposing the action.[71] The third element of the precautionary principle requires a proposed action to be blocked if there is significant uncertainty or risk of irreversible harm. This element represents the

[70]Phillip M.Kannan, The Precautionary Principle: More than a Cameo Appearance in United States Environmental Law?, 31 Wm. & Mary Envtl. L. & Pol'y Rev. 409 (2007) at 422-23
[71]Id. at 424

normative judgement that the role of the government is to protect against future harms in addition to those established by scientific certainty.[72]

The precautionary principle, which is a substantive policy, can be implemented primarily through either substantive or procedural requirements or both. The precautionary principle may be included within a domestic legal regime "through specific statutes, regulations, or policies that either by their express terms or as interpreted by court decisions impose a precautionary approach for the particular conduct that is the subject of the statute."[73]

The precautionary principle standard could entail the court posing following questions to the defendant:

a) Whether the non-movant has taken up statutory and non-statutory risk assessment (irreversible and irretrievable commitments of natural resources)
b) Whether precautionary steps were initiated while implementing the proposed project (including identifying viable and newer alternatives)
c) Whether the project proponent can submit proof of ability (risk management) to prevent irreversible environmental harms that are likely to arise during the implementation of the project.

Risk assessment is a 'formal appraisal' of two elements: (a) the likelihood of an event occurring and (2) the magnitude of the consequences should that event occur. Risk management is the process of weighing the assessed risks against the expected benefits to make the best decision.

The failure to evaluate as deemed by the court is essentially a failure to apply precautionary principle in projecting and mitigating the risk of irreparable environmental harm caused by a proposed action. Such failure to assess and evaluate risks in proceeding with the project entails a preliminary injunction. NEPA imposes a mandate on agencies to assimilate requisite information surrounding a project, although silent on how such collated information needs to be used in preventing a risk of irreparable environmental harm. When courts order calls for "maintaining the status quo" it effectively means that when precautionary steps are not taken immediately on notification of threats of serious or irreversible harm to the environment, the results may be irreversible or difficult to reverse.

[72]Id. at 426
[73]Id.

Concerned about the problem of irreversibility, sensible legal systems might want to adopt a distinctive principle for handling certain kinds of risk: the *Irreversible Harm Precautionary Principle*.[74] The principle takes the form of an insistence on paying a premium to freeze the *status quo* and maintain flexibility for the future, while new information is acquired.[75] The '*Irreversible Harm Precautionary Principle'* assumes all environmental harms are irreversible in the relevant sense, and requires a strong showing by those who seek to proceed in the face of that harm.[76]

The Supreme Court endorsed the principle through its explicit recognition that environmental injury is often permanent and long-term. In *Winter v. Natural Resources Defense Council,* Justice *Breyer* noted "NEPA seeks to assure that when Government officials consider taking action that may affect the environment, they do so fully aware of the relevant environmental considerations. It follows that "when a decision to which EIS obligations attach is made without the informed environmental consideration that NEPA requires, much of the harm that NEPA seeks to prevent has already taken place." That means that the "absence of an injunction thereby threatens to cause the very environmental harm" against which NEPA was designed to guard.[77]

Environmental Accounting

The hypothesis and suggestion of a new standard is based entirely on the application of the Precautionary Principle. For the purpose of this paper, the new standard is termed as '*The Natural Capital Standard*'. It can be treated as an uniform federal standard applicable to preliminary injunction pleas in environmental cases. *Natural Capital* is defined as the whole endowment of land and resources available to us, including air, water, fertile soil, forests, fisheries, mineral resources, and the ecological life-support systems that make economic activity, and indeed life itself, possible. The *Natural Capital Coalition*,[78] during the development of the *Natural Capital Protocol*, formally established a single harmonized definition of *'Natural Capital'* from several forms of working definitions.

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[74]Sunstein, C. R. (2018). Irreparability as Irreversibility. The Supreme Court Review, 2017(1), 93-114.
[75]Id.
[76]Id. at 15.
[77]Winter, 555 U.S. 7 at 35.
[78]https://naturalcapitalcoalition.org Last Accessed on 15.12.2021

- *Natural capital is another term for the stock of renewable and non-renewable resources (e.g. plants, animals, air, water, soils, minerals) that combine to yield a flow of benefits to people.*
- *All this means is that any part of the natural world that benefits people, or that underpins the provision of benefits to people, is a form of natural capital.*
- *Natural capital is a stock, and from it flows ecosystem services or benefits. These services (where service is defined as a system* supplying *a public need) can provide economic, social, environmental, cultural, spiritual or eudemonic benefits, and the value of these benefits can be understood in qualitative or quantitative (including economic) terms, depending on context.*
- *Biodiversity is an essential component of natural capital stocks and an indicator of their condition and resilience. Biodiversity itself provides benefits directly to people."*

The Coalition and its partners designed a framework known as the *'The Natural Capital Protocol*' which allows businesses to measure, value and integrate natural capital impacts and dependencies into existing business processes such as risk mitigation, sourcing, supply chain management and product design. The *Protocol* aims to support better decisions by including how we interact with nature or '*natural capital' i*n decision making.

The Coalition emphasizes on the principle that every business depends on natural capital and it invariably impacts natural capital, creating costs and benefits for both businesses and society. It also creates opportunities for growth. Such impacts can arise directly from business operations or indirectly from the use of products and services. All biophysical goods and services have an economic value. When ecologists and natural scientists coordinate with economists, together they are able to a) describe the production of ecosystem goods and services in biophysical terms, and 2) translate that biophysical production into estimates of economic value.[79]

Classical economist of the 19th Century, *David Ricardo*, author of *'The Principles of Political Economy and Taxation (1817),* was concerned with the exploitation of land and its productivity as a fundamental determinant of economic production. It simply highlights the need to curb activities that decrease the productive capacity of land and diminish its value for the future that can produce sustainable yields and retain soil fertility. To state an example,

[79]Boyd, J. (2012). Economic Valuation, Ecosystem Services , and Conservation Strategy.

when a nation cuts down its forests for domestic consumption of timber or export, the abstract value that enters the national income accounts as a positive contribution to income, equal to the value of timber. No accounting is made for the loss of standing forest, either as an economic resource or in terms of its ecological value, which sums up to the fact that national income accounting systems do not provide for *'natural capital depreciation'*. Economists have suggested accounting of the state of natural capital and of its deterioration or replenishment that reflects in national income accounting. Yet, business practices do not account for the loss of standing forest, either as an economic resource or in terms of its ecological value. This is a fundamental premise in *Ecological Economics*, a branch of economics that aims to improve and expand economic theory to integrate the earth's natural systems, human values, human health and well-being. This is crucial in the sense that most of the ecosystem services and natural resources are not being paid or accounted for in business accounting.

The state holds the natural resources in trust for its citizens and it is important that courts help the states to preserve the value of such capital that manifests itself in an abstract form in almost all business processes. The absence of natural capital accounting can justify an injunction against a defendant whose flow chart on business practices and processes is opaque with regard to its contribution to the '*circular economy*'. There exists several forms of defining the term circular economy. Essentially, it is a model of production and consumption that extends the life cycle of products by designing out waste and pollution, by reducing generation of waste and regenerating natural systems. Economic exploitation of natural resources often exceeds ecologically sustainable levels. An ecological evaluation, a crucial assessment as part of the EIA prepared for a project, can help determine sustainable yield levels at which the system can continue to operate.

Techniques advocated for natural capital accounting including: a) physical accounting for pollutant build-up, water quality, soil fertility and other environmental conditions. b) determination of sustainable yields as discussed above; c) determination of absorptive capacity of the environment for human-generated wastes that include industrial and agricultural wastes. Application of these techniques within a business process will help achieve 'natural capital sustainability' where nations conserve their natural capital by limiting its degradation and investing in its renewal.[80]

[80] Geneletti, D. (2002). *Ecological evaluation for environmental impact assessment* (pp. 48-49). Koninklijk Nederlands Aardrijkskundig Genootschap.

Natural Capital accounting helps attain resource efficiency when earth's natural resources are exploited in the most sustainable manner without any negative impact on the sources itself. A major indicator of resource efficiency that is crucial to assessing the state of natural capital, is *'sustainable yield levels'* that call for well-balanced exploitation of natural resources within ecologically sustainable levels. Natural capital accounting can be achieved by conducting ecological evaluation, which essentially means' assessing the significance of an area for nature conservation that assimilates criteria and information that can be used to support decision-making in nature conservation by all stakeholders. The most crucial components of the environment protection relates to land-use change and soil fertility that impacts food security and subsistence livelihoods across the globe. It would be interesting to note that the *United Nations Environment Programme- World Conservation and Monitoring Centre* has developed a global map of natural capital.[81] The International Standards Organisation has developed a methodological framework for environmental impacts and related environmental aspects which, according to ISO, follows the norms of welfare economics. The term environmental aspects in this context is deemed to refer to that "element of a business activity, product or service which interacts or is likely to interact with the environment."

Courts, when hearing a plea for preliminary injunction, need to question from the perspective of complying with principles of ecological economics:

a) *If the defendants have presented substantial information on the use of ecosystem services within the business activity, including groundwater exploitation, impact on land and soil by the proposed activity;*
b) *details relating to offsetting of carbon emissions from the activity;*
c) *If the defendants have placed before the court the projected investments in the replenishment and conservation of natural resources and ecological recovery;*
d) *If the defendant is following a certification model for sustainability of all of its products.*

The questions may seem redundant in the light of the fact that the party presents a detailed Environmental Impact Statement or the EIS in regard to the proposed activity. But, the finer aspect is that it calls for information on the value of dependencies by the businesses on ecosystem services and their encroachment upon habitats that may result in indirect impacts.

[81] https://www.unep-wcmc.org/en/news/towards-a-global-map-of-natural-capital.

Referred to as '*Net Positive Impact*' that is defined as "putting back more into society, the environment and global economy that you take out". This effectively means that Courts when using the 'natural capital' standard are entitled to call for those details as indicated in the *National Capital Protocol* to get a clear picture on the impact of businesses on natural resources and their valid dependencies on natural capital.

Natural Capital Accounting needs to be an integral part of the preparation of Environmental Impact Assessment (EIA) in the absence of which the impact assessment document or EIS be rendered incomplete. The need for meeting *Protocol* requirements within an EIA is a topic for an independent discussion that calls for amending the nature of information required to be provided in an EIA. The *Protocol* is exhaustive and is a good reference point for courts when applying the 'natural capital' standard in deciding injunction pleas relating to environment and natural resource management.

Courts need to intervene to ensure businesses account for depletion of forest cover, sustainability of the business activity, its contribution to ecology of the region and the economic and social impact of losing value and the extent of natural resources in the region and accounting for the *'natural capital depreciation'*. Questions relating to application of ecological principles in process mechanisms, physical accounting of natural capital using inventories that reflect either the abundance or scarcity of natural resources within a particular region, indicators on soil fertility, level and quality of groundwater in the region, air and water pollution levels, accounting systems that specify resource depletion or environmental degradation that the region may eventually sustain. An injunction is due when the defendant is unable to present basic and necessary information as required under the *Protocol* that helps determine if the defendant has taken sufficient steps to conserve resources by incorporating precautionary measures within his business processes and if its contribution to the circular economy is indeterminable.

Ultimately, the entire discussion on natural capital and sustainability is based on the principle of *'natural capital sustainability*' where nations aim to conserve their resources by limiting their depletion or degradation and investing in its renewal or replenishment. Extensive and unsustainable exploitation of natural resources permanently alters the ecological balance that can change the natural landscape of a region leading to unpredictable results. The most disastrous form of ecological imbalance is when a species goes extinct causing damage that is irreversible and imposes an unknown and incalculable economic and ecological cost in the future. Ecological economists favour the application of precautionary principle prior to commencing any

business activity so as to ensure human interference with natural systems and ecosystem services is restricted to the minimum. Finally, economic systems must achieve a sustainable scale of economic activity at which the planet's ecosystems are not subjected to undue stress.

The Natural Capital standard when applied will rule out any award of damages as compensation for exploitation of resources that are no longer available for use by posterity and rendered irretrievable by irrevocable actions of a business entity. Damages or any form of offsetting will no longer be a compensation for specific things lost by the plaintiffs, emphasizing on replenishment and restoration of finite resources. When soil loses its fertility, its ability to keep nourished the flora and fauna dependent on it and the land is degraded, an award of damages seems farcical without an order restoring intangible rights of citizens. Natural Capital standard will be a beacon to aid courts in enjoining illegal activities such as removal of timber, extraction of minerals and other mining activities using unsustainable methods, violation of zoning laws, illegal forms of land use change without exploring economic hardship caused to business entities. Courts can enjoin activities that do not comply with natural capital accounting that aims to promote a low-carbon economy. Ultimately, under the Natural Capital Standard, Precautionary Principle, irreparable harm and public interest factors will come to the fore when injunction pleas are taken up for hearing. The primary objective of environmental law statutes may be fulfilled by the courts as they avoid a long winding examination on the infringement of legal rights of parties, presence or absence of statutory violations as requisites for grant of preliminary injunction. The Natural Capital Standard ensures efficient conduct by parties during the pendency of litigation. The issues that may remain for trial or final hearing may be very limited or may have become infructuous.

Conclusion

A litigant in the environmental context hopes to convince the court that she is before the court with a plea to protect the environment and to stop any activity that she believes is causing injury to a distinct natural resource or that an injury to the environment may turn out to be irremediable with the passage of time. Presently, courts hold divergent opinions on standards applied to injunction pleas and the lack of consistency and ambiguity is largely evident. In the present context, Professor *Leubsdorf"s* theory on preliminary injunction and the redundancy in issuing an injunction without preliminary examination on the merits is well reasoned out. Similarly, the scholarly premise put forth by *U.S.Magistrate, Martin Denlow*, on the need to adopt a new and uniform

federal standard for injunctive relief is compelling and persuasive. A multitude of scholars have sought the aid of the Supreme Court of the United States to develop a uniform federal standard for granting environmental injunctions that can impact the way courts accentuate their decisions in climate change litigation.

Courts invariably fail to examine the economic consequences of their own injunction orders. Legal infirmities such as inconsistent judgements and inequitable decisions that form the core of environmental jurisprudence need to be limited, if not totally eliminated. A final remedy in environmental litigation is more functional when it serves a larger cause or the greater good. A reworking of environmental statutes to list out violations that imposes strict liability and statutory remedies on the lines of natural capital accounting can ease the burden on courts that are on the constant lookout for parameters. Natural Capital standard is one such tool, the application of which can ensure that right and relevant information is presented to the court to determine any *prima facie* violation by the defendant. Failure to produce critical information required to assess the impact and dependency of the relevant business activity on the ecology and natural resources of a region as called for by the Natural Capital Protocol should facilitate an injunction.

Economic efficiency flows with corrective justice that is based on the idea that the plaintiff should not be made to suffer and must be made whole by restoring him or her to their rightful position. Simply put, the plaintiff should be placed in the position they were but for the harm of the defendant.[82]

Currently, there are four major methods the courts and legislature of the United States have developed to calculate remedies in environmental harms; the economic loss model, contingent valuation method, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Oil Protection Act (OPA), and the Restore Act. The economic loss model does not take a comprehensive view of environmental harms that are restricted merely to people and their businesses. Loss of value to nature, natural resources is most often undermined in such an approach to environmental litigation. According to some, the contingent valuation method results in double counting of harms. The CERCLA and OPA and the other legislations are based on the rule of strict liability where clean-up is ordered scientifically leaving no scope for ambiguous interpretation of damage caused by hazardous wastes. On a review of case laws it is evident that courts have refrained from applying

[82]Ernest J. Weinrib, The Gains and Losses of Corrective Justice, 44 *Duke Law Journal* 277-297 (1994)

principles of corrective justice and economic efficiency. The speculative nature and ambiguity in determining environmental harms can be overcome by adopting a scientific approach to assessing the real and actual extent of damage to natural resources using the *Natural Capital Protocol*. Environmental protection and natural resource management can no longer stand alone on statutory capabilities. They need to assimilate principles of environmental economics, social welfare economics and ecological economics into the decision-making processes. Environmental governance is taking a form that is more technologically advanced and changing the contours of environmental jurisprudence. The courts need to alter their line of inquiry that leans on scientific data on natural resources and future implications of businesses not being held accountable for depletion of natural resources in order to meet the goals of sustainable development.

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