

ASSESSING THE NATIONAL GREEN TRIBUNAL AFTER FOUR YEARS

—ARMIN ROSENCRANZ* & GEETANJOY SAHU**

The National Green Tribunal, established in 2010, has in the short term since its establishment strongly influenced environmental litigation in India. Unlike its predecessor the National Environment Appellate Authority, its five benches have wide ranging powers to adjudicate upon any dispute that involves questions of importance to the environment. This power coupled with technical expertise has exponentially strengthened the environmental protection regime in the country. In a number of decisions, the Tribunal has proved its efficiency in resolving environmental disputes. In this article, the authors survey some of the landmark decisions given by the various National Green Tribunal benches in an effort to discern the trends in environmental jurisprudence in India.

I. INTRODUCTION

The National Green Tribunal (hereinafter referred to as 'NGT'), enacted by Parliament in 2010¹, seems to have caught the attention of the Modi government because of its unusual effectiveness. The current Environment Ministry seems to want the NGT to make recommendations to the government instead of issuing directions like a judicial body. In its view, only the amenable Supreme Court of India should have the right to reject clearances. A year ago, the ministry asked the tribunal to limit its jurisdiction, but the proposal was rejected. The move to amend the relevant legislation was initiated by Environment Minister Javadekar himself. A cabinet note² to water down the powers and jurisdiction of the tribunal will be circulated for inter-ministerial discussion soon, sources have said.

* Co-author of ENVIRONMENTAL LAW AND POLICY IN INDIA (3rd. Edn., forthcoming), visited W.B. National University of Juridical Sciences in September 2014. Former consulting professor and trustee, Stanford University. Founder, Pacific Environment.

** Assistant Professor at the Tata Institute of Social Sciences. The authors would like to acknowledge the research assistance of Anjali Kumar, Kruthika NS and Rishika Lekhadia.

¹ Vide the National Green Tribunal Act, 2010 (Act 19 of 2010).

² Prepared by the Ministry of Environment and Forests. The ministry has been now renamed as the Ministry of Environment, Forests and Climate Change.

Since its inception in 2010, the NGT, which is headed by a former Supreme Court judge, has stayed approvals for several projects. In *POSCO case*³, the NGT asked the Environment Ministry to review clearances after some local villages refused to consent to the project under the pro-tribal Forest Rights Act, 2006. Officials say the requirement of mandatory consent from the *gram sabha* for initiating any project is the biggest hurdle in pushing infrastructure development in mineral rich, poor regions.

The NGT has repeatedly rejected the views of its nominal master, the Ministry of Environment and Forests (hereinafter referred to as 'MoEF'). It has criticized the Ministry for poor decisions or actions and has been frequently resorted to by civil society groups seeking and getting relief from environmentally irresponsible actions of the government.

Before the NGT was enacted, some environmental disputes were referred for settlement to the woefully ineffective National Environment Appellate Authority (hereinafter referred to as 'NEAA'). This body was created by the Parliament in 1997.⁴ The NEAA Act created a body that mainly dealt with environmental clearances⁵, and was always under MoEF's thumb. The Parliament of India, recognizing the need for the speedy and expeditious disposal of environmental cases, especially in light of the burden of pending litigation⁶, established the NGT in 2010, which has superseded NEAA.

II. THE NGT ACT

The NGT was first established with the Principal Bench in Delhi, later followed by four zonal benches in Chennai, Pune, Bhopal and Kolkata. The preamble of the Act declared that the NGT had been set up to carry out, *inter alia*, the constitutional obligations under Article 21.⁷ Unlike the NEAA, the NGT was granted wide ranging powers allowing it to adjudicate cases of protection of the environment, natural resources and the legal rights of people being affected under a number of existing laws such as the Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981, the wide-ranging Environment Protection Act, 1986 and the Biological Diversity Act, 2002.

The NGT was envisaged by its enactors as a specialized environmental body, consisting of judicial members as well as expert members, who

³ *Prafulla Samantray v. Union of India*, Appeal No. 8 of 2011 dated 30-3-2012.

⁴ National Environment Appellate Authority Act, 1997 (Act 22 of 1997).

⁵ *Id.*

⁶ *Fifteenth Lok Sabha Debate*, LOK SABHA DEBATES, (30-4-2010), <<http://164.100.47.132/LssNew/psearch/Result15.aspx?dbsl=2380>>.

⁷ See The Preamble, the National Green Tribunal Act, 2010: "AND WHEREAS in the judicial pronouncement in India, the right to healthy environment has been construed as a part of the right to life under Article 21 of the Constitution."

have the necessary proficiency to deal with issues of environmental importance. A retired Supreme Court judge was appointed to lead the NGT as the Chairperson. The current chairperson, Justice Swatanter Kumar, took over office from Justice Lokeshwar Singh Panta on December 20, 2012.⁸ In accordance with Section 7 of the Act, his term will end in December 2017.⁹ Thus, he has three more years to continue on his present course of environmental management and improvement.

III. AN INDEPENDENT STATUTORY PANEL

The NGT has been given enormous powers to deal with environmental litigation. The provisions of the Act stipulate that efforts to seek judicial intervention for the protection and improvement of environment will not be rejected on the grounds that the problems concerned involve complex, scientific and technical questions beyond the purview of the court. This gives cause for hope to environmental advocates who are interested in filing Public Interest Litigations (hereinafter referred to as 'PILs'). Furthermore, the NGT, with only two judicial members, is an independent statutory panel and consists of eight experts from the fields of physics, chemistry, botany, zoology, engineering, environmental economics, social sciences and forestry who help and advise judges on a regular basis. The inclusion of different experts to deal with different aspects of environmental problems will undoubtedly help the NGT to look beyond the simple cost-benefit considerations of a particular project and to serve the larger interests of environment and development.

The setting up of the NGT will help petitioners bring local environmental problems to the notice of the judiciary at little cost, while examining the environmental impacts of government decisions. It has been empowered to adjudicate disputes relating to environmental protection. It has the power to declare illegal and invalid any administrative action that contravenes or undermines environmental laws. The NGT is empowered to review orders passed under all existing environment protection laws, including those involving water, air, forests and wildlife. No other court or authority can entertain any claim or action that can be dealt with by the Tribunal. This should make government departments cautious in clearing projects with potential environmental impacts.

IV. FOUR YEARS OF PROTECTING ENVIRONMENT AND THE RIGHTS OF MARGINALIZED PEOPLE

An analysis of the NGT's role over the last four years suggests that it has been progressive in its approach towards environmental protection in

⁸ Vide Notification No. S.O. 2967(E), published in the Gazette of India on 20-12-2012.

⁹ The National Green Tribunal Act, 2010, *supra* note 1, at S. 7.

general and the rights of marginalized people in particular. The NGT has not only come down heavily against microstructures but has also challenged the big corporate sectors and the central and state governments for not following environmental regulations. For example, in *Jeet Singh Kanwar v. Union of India*¹⁰ case, the petitioners challenged the environmental clearance given to the respondents' proposal to install and operate a coal-fired power plant. The petitioners argued that the mandate of the various guidelines in the Public Consultation Process¹¹ had not been complied with and had even been flouted in granting the clearance. Neither the executive summary of the EIA report in vernacular language nor the full EIA report had been made available, as required, 30 days prior to the scheduled date of public hearing. The NGT observed that according to the precautionary principle, the environment clearance should not have been granted by the MoEF.¹² Moreover, it observed that the economic benefits of the project would have to defer to the environment if the project involved continuing and excessive degradation of the environment. The Tribunal further pointed out that the impugned order of the MoEF granting environmental clearance to the power plant was illegal and liable to be quashed.¹³

Similarly, in *Adivasi Majdoor Kisan Ekta Sangthan v. Ministry of Environment and Forests*¹⁴, the petitioner challenged the environmental clearance granted by the Ministry of Environment and Forests to Gare—IV/6 Coal Mining Project (4 MTPA) and Pithead Coal Washery (4 MTPA) of Jindal Steel and Power Limited located in the Raigarh District of Chhattisgarh. The petitioners argued that the environmental clearance had been granted to the project without properly conducting a public hearing as stipulated by the EIA Notification 2006.

The NGT observed while giving its order that this was not a case where there had been a few insignificant procedural lapses in conducting the public hearing.¹⁵ This was, rather, a mockery of a public hearing, one of the essential parts in the process of deciding whether to grant an environmental clearance. It was, in fact, a classic example of violation of the rules and the principles of natural justice. Accordingly, the Tribunal considered it appropriate to declare that the public hearing conducted in the case was invalid.¹⁶

¹⁰ Appeal No. 10 of 2011 (T) dated 16-4-2013.

¹¹ Vide Environmental Impact Assessment (EIA) Notification dated 14-9-2006 issued by the MoEF.

¹² *Id.*

¹³ *Id.*

¹⁴ Appeal Number 3 of 2011 (T) (NEAA No. 26 of 2009) dated 20-4-2012.

¹⁵ *Id.*

¹⁶ *Id.*

V. STRENGTHENING THE NGT

Environmental activists hope that the National Green Tribunal will continue to address the unequal distribution of environmental goods and burdens and protect the rights of underdogs as it has done so far. To ensure appropriate responses to environmental litigations, however, the Indian government should lay down guidelines for the effective exercise of powers by the NGT. The decisions of the Tribunal and expert groups should be respected and implemented by all other government departments. If this happens, the NGT's role will benefit India's long term environmental improvement. There should also be stringent guidelines in place for the appointment of expert members to the Tribunal based on the suggestions of different environmental groups, legal experts, judges, and academics. The entire process should be transparent and amenable to public scrutiny and review by judicial bodies and experts from different backgrounds, including scientists, technicians, judges and NGOs.

In order to be able to entertain petitions and prevent frivolous environmental litigations, the National Green Tribunal should be equipped with all the resources required for scrutinizing and reviewing petitions and investigating the intentions of petitioners who seek its attention. Its function should be more transparent than the Supreme Court's in environmental cases. More importantly, the procedures of PIL should be institutionalized with guidelines in place for emphasizing the conditions under which the tribunal can entertain or reject a petition seeking its attention. Moreover, given the present composition of the NGT, it is very difficult on its part to monitor its directions in each and every case. In order to implement NGT's directions effectively, it is necessary to make the implementation process more efficient through the marshalling of agencies responsible for the control of pollution, such as local government bodies and pollution control boards. It is also highly advisable to keep the petitioner involved in the monitoring of court directions.

The legal framework also needs to be comprehensive and suitably designed for objective interpretation of environmental laws and policies. There is a plethora of legislations on environmental issues in India but many of them date back to the pre-independence era and do not correspond to the policies or realities of the post-independence period. As a result, they need to be reviewed and consolidated. The Forest Law of 1927, and the Waste Claims Act, 1863, in particular, need to be reviewed in order to bring them up to date with the constitutional proclamations of environmental protection and the objectives of the Forest Policy of 1988 and other policies of land use. Many areas of environmental concern, including noise pollution and radioactive waste proliferation, are inadequately covered under existing legislations and need to be addressed by updated legislation. Environmental impact assessment and industrial zoning must also be provided with adequate legal support.

Adapting to emerging environmental problems and reflecting diverse environmental values in the existing environmental laws, providing executive bodies with the resources required for dealing with environmental problems, and devolving powers to local institutions and communities wherever necessary will all ensure better management of natural resources in India. Clear guidelines on some aspects of environmental laws and policies will also provide the National Green Tribunal with the independence and strength required to deal effectively with environmental litigations. Unlike the Supreme Court, which must engage constantly with the legislature and executive on a whole range of pressing issues, the National Green Tribunal enjoys the quality time needed for dealing only with environmental litigation in an effective manner. Prior to 2010, the Supreme Court was overburdened with a proliferation of environmental litigations, and its judges did not have the requisite expertise to deal with them. Moreover, the scientific agencies it relied on for advice and monitoring were often weak or inconsistent. The National Green Tribunal is not burdened by the same problems. In fact, it now has the opportunities and advantages required to further strengthen the foundations of Indian environmental jurisprudence laid down by the Supreme Court through its series of innovative and landmark judgments.

The National Green Tribunal could play a particularly significant role in the context of proposed reforms regarding the structure of environmental governance and the emergence of active environmental groups in the country. However, the process of environmental jurisprudence, led initially by the Supreme Court of India and post 2010 by the National Green Tribunal, needs to be reformed in many ways. First, judges and young lawyers need to be sensitized on different aspects of environmental problems and the ways in which environmental values are framed and reframed in Indian society. Judges cannot ignore public discourse on environmental issues but at the same time they should not allow such discourse or media reports to outweigh their own perceptions of the environmental evidence before them. They need to be well read in the subject. The bar should be strong and effective as well. The quality of judgments is highly dependent on the quality of arguments made by the lawyers.

VI. IMPLEMENTING NGT DECISIONS

Further, the institutions involved in resolving environmental disputes, whether the Supreme Court or the National Green Tribunal, need to be strong and effective in ensuring that their directions are implemented. Implementation should not be done through monitoring committees. Many judges believe that the Court should not seek to implement its directions through the use of monitoring committees as this makes the Court an investigative rather than adjudicative agency. However, other judges believe that leeway has been given time and again to polluters and implementing agencies

but they have only perpetuated illegal behavior, thus forcing the judiciary to intervene aggressively. Most concur, however, that implementing agencies need to be made stronger and more effective. Courts and the NGT should lay down strict conditions for the implementation of environmental judgments, identify the executive agency responsible for carrying them out, and ensure the accountability of the agency if it fails to follow directions. The Supreme Court and the National Green Tribunal need to fix responsibility on these implementing agencies.

VII. VII. ENVIRONMENTAL CHECKS AND CLEARANCES

The Principal Bench of the NGT at New Delhi has given some powerful judgments in the recent years which have strengthened the process of obtaining environmental clearances (hereinafter referred to as 'EC'). For instance, the case of *M.P. Patil v. Union of India*¹⁷ wherein the Tribunal examined the details of the basis on which environmental clearance was obtained by the National Thermal Power Corporation Ltd (hereinafter referred to as 'NTPC'). It was found that NTPC was guilty of misrepresenting facts to obtain the EC. Additionally in this case the tribunal stressed on the importance of a Rehabilitation and Resettlement Policy that adequately took into consideration the needs of those affected by the project.¹⁸ In determining who would fall within the ambit of such persons, the tribunal chose an expansive definition instead of restricting it only to the land owners in the region. Finally, it was reiterated that the burden of proving that the proposed project was in consonance with goals of sustainable development was on the party proposing the project.¹⁹

Another landmark decision given by the Principal Bench in March 2013 related to the diversion of forests in the Tara, Parsa and PEKB coal blocks. The Forest Advisory Committee (hereinafter referred to as 'FAC') had rejected the proposal in its recommendations to the Central Government; however the latter went against the recommendations and gave its approval. In the instant matter, the tribunal scrutinized not only the validity of the Government's rejection but also the report submitted by the FAC.²⁰

Section 2 of the Forest (Conservation) Act, 1980 (hereinafter referred to as the 'FC Act') spells out the role of the Central Government in the matter of granting prior approval to the State Governments' proposals for use of forest land for non-forest purposes. Section 3 of the FC Act further reveals that the Forest Advisory Committee is the creation of the Central Government made for seeking advice in the matters connected with the grant of approval under

¹⁷ Appeal Number 12 of 2012 dated 13-3-2014.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Sudiep Shrivastava v. State of Chhattisgarh*, Appeal No. 73 of 2012 dated 24-3-2014.

Section 2 of the FC Act and connected with forest conservation. The FAC is expected to give an informed, non-arbitrary decision. While tendering the advice, the Committee may also suggest any conditions or restrictions on the use of any forest land for any non-forest purpose, which in its opinion, would minimize adverse environmental impact.²¹ Examining the report of the FAC in light of the Wednesbury principle of reasonableness, it was noted that instances of human-wildlife conflict had not been examined by the FAC. Therefore it was held that it had ignored a very relevant material which it should have taken into consideration, and thus the report itself was arbitrary.²²

In the same case, the Central Government's authority to act against the recommendations was also examined. Specifically the question that arose was whether the advice rendered by FAC was to be followed by the Central Government.²³ The tribunal averred that 'advice', read in its ordinary and grammatical sense, would not make it binding *stricto sensu* on the Central Government.²⁴ However, the Central Government remains under an obligation to duly consider the advice of the FAC and pass a reasoned order either accepting with or without condition or rejecting the same based on facts, studies and such other authoritative material, if necessary gathered from further enquiry. The tribunal finally asked the Government to reconsider the entire matter afresh in accordance with law.²⁵

VIII. SOME KEY VERDICTS

The NGT's Principal Bench recently gave its verdict in *Braj Foundation v. Govt. of U.P.*²⁶ The case was brought forth by the Braj Foundation, and their contention was that the Government should be directed to execute the Memorandum of Understanding (MoU) for the afforestation of Vrindavan forest land. The Tribunal gave the verdict against them, holding that the MoU is not legally enforceable. Further, it was decided that the advertisement issued by the Forest Department was only an 'invitation to treat' and could not be a ground to enforce contractual obligations. Thus, the Government was allowed to continue with its policy decision of taking up the afforestation work on its own, especially since involvement of third parties would give rise to the possibility of illegal mining and encroachment. However, the Tribunal also went a step forward and gave directions to the Government itself to ensure proper afforestation. One of the most significant ones was the direction to declare at least a 100 meter long stretch on both sides of the Braj Parikrama route as a 'no development zone'.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Application No. 278 of 2013 and MA No. 110 of 2014 dated 5-8-2014.

In *Vardhaman Kaushik v. Union of India*²⁷, the Court took cognizance of the growing pollution levels in Delhi. It directed a Committee to prepare an action plan and in the interim, directed that vehicles more than 15 years old not be allowed to ply or be parked on the roads; that burning plastics and other like materials be prohibited; that a web portal and a special task force be created; that sufficient space for two way conveyance be left on all market-roads in Delhi; that cycle tracks be constructed; that overloaded trucks and defunct buses not be allowed to ply; that air purifiers and automatic sensors be installed in appropriate locations.²⁸ In further orders in the next hearing, it directed that a fine of Rs. 1000 be levied on *all* cars parked on metalled roads and that multi-level parking be construed in appropriate areas.²⁹

Other recent decisions of the NGT have included *T. Murugandam v. Ministry of Environment & Forests*³⁰ wherein the importance of proper analysis and collation of data and application of mind by the EAC was stressed upon. Questions of the jurisdiction of the Tribunal have also been fairly recurrent. In *Kalpavriksh v. Union of India*³¹ the Tribunal ruled that its jurisdiction extends to all civil cases which raise the substantial question of environment and arise from the implementation of the Acts stated in Schedule I of the NGT Act. For this purpose the term 'implementation' must neither be too constrained nor too expansive nor keep in view all the Notifications, Rules and Regulations promulgated under the Act. Again in *Tribunal at its Own Motion v. Ministry of Environment & Forests*³² it was held that wildlife is a part of environment and any action that causes damage or is likely to cause damage to wildlife, could not be excluded from the purview of the tribunal. The Tribunal has also given detailed directions in decisions involving contamination and pollution of river waters. For instance, in *Krishan Kant Singh v. National Ganga River Basin Authority*³³ the Tribunal gave a range of time bound and specific directions to the polluting industrial units as well as the Municipal authorities who were asked to allow the former to comply with directions. In another, *Manoj Misra v. Union of India*³⁴ the Tribunal gave a set of twenty eight directions, ranging from prohibition on dumping debris to restricting silviculture and floriculture activities, in the interest of protecting and restoring the River Yamuna.

IX. REGIONAL BENCHES OF THE NGT

Regional NGT benches have also given judgments that might potentially prevent project proposers from by-passing environmental checks. One

²⁷ Original Application No. 21 of 2014.

²⁸ Vide order dated 26-11-2014.

²⁹ Vide order dated 19-1-2015.

³⁰ Appeal No. 50 of 2012.

³¹ Application No. 116 (THC) of 2013 dated 17-7-2014.

³² Original Application No. 16 of 2013 (CZ) dated 4-4-2014.

³³ Application No. 299 of 2013 dated 31-5-2014.

³⁴ Original Application No. 6 of 2012 and MAs Nos. 967 of 2013 & 275 of 2014 dated 13-1-2015.

such case was *Samata v. Union of India*³⁵ in which the Tribunal relaxed the concept of *locus standi* to allow a wider base of people to approach it with regard to environmental concerns. It was found that in the relevant provisions the term 'aggrieved persons' would include not just any person who is likely to be affected, but also an association of persons likely to be affected by such an order and functioning in the field of environment.³⁶ The other issue in this case was whether the public hearing had been conducted if the Environmental Impact Assessment (hereinafter referred to as 'EIA') report had not been published in the local language.³⁷ The Tribunal found that there was no such requirement imposed; however in the same breath it mandated the Expert Appraisal Committee to act in light of the public's larger interests and work to balance developmental and environmental concerns.³⁸

As in *Samata*³⁹, the South Zone bench emphasized the importance of the principles of precautionary principle and sustainable development in the *K.K. Royson*⁴⁰ case. Again in this case we witness the relaxation of *locus standi* requirements. The Bench held that where the matter concerned the ecology and the environment, everybody was directly or indirectly affected and thus the right to initiate action could not be limited only to persons who were actually aggrieved.⁴¹ Other issues that the Court examined in this case were that of an unqualified agency giving approval and of the requirements of conducting public hearing according to the EIA Notification, 2006.⁴²

X. CONCLUSION

The NGT is the most consistent and progressive environmental authority in India. Unlike the Supreme Court, the NGT does not routinely favour infrastructure projects, nor does it cause a delay in resolving the cases before it. It had redefined the role of environmental experts and the criteria to select such experts. It has been largely successful in implementing its orders, which usually relate to staying environmental clearances. The regional green tribunals seem even more active and aggressive than the NCT in Delhi, as the regional judges are fearless and have no ambition for national positions. Finally, the NGT seems to have encouraged a number of lawyers all over India to specialize in environmental law.

³⁵ Appeal No. 9 of 2011, NEAA Appeal No. 10 of 2010 dated 13-12-2013.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Appeal No. 9 of 2011, NEAA Appeal No. 10 of 2010 dated 13-12-2013.

⁴⁰ *K.K. Royson v. Govt. of India*, Appeals Nos. 172, 173, 174 of 2013 (SZ) and Appeals Nos. 1 and 19 of 2014 (SZ) and Appeal No. 172 of 2013 (SZ) dated 29-5-2014.

⁴¹ *Id.*

⁴² *Id.*