

Commentary on India's National Green Tribunal Act

Introduction

The National Green Tribunal Act of 2010¹ is an act created to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith.

Chapter I of the Act entitled "Preliminary" provides preliminary information which includes the short title, date of commencement and a definition section. Chapter II of the Act entitled "Establishment of the Tribunal" consists of the language establishing the tribunal, the composition of the tribunal, the qualifications for the appointment of a chairperson, judicial member and expert member, the details on who appoints the aforementioned parties, the term and office and other conditions of service of these parties, policies regarding resignation, the conditions relating to salaries, allowances and other terms and conditions of service, the policies involving removal and suspension of the chairperson, judicial member and expert members, the procedures to follow if there is a vacancy, details about the staff of the tribunal and information about the financial and administrative powers of the Chairperson. Chapter III entitled "Jurisdiction, Powers and Proceedings of the Tribunal" consists of the role of the tribunal, the rules regarding relief, compensation and restitution, the rules regarding appellate jurisdiction, the rules regarding the payment of liability for relief and compensation in certain cases, the process of an application or appeal to the tribunal, the procedure and powers of the tribunal, the principles that will be applied by the tribunal, the use of decision-making by a majority, the

¹ *The National Green Tribunal Act, (No. 19 of 2010)*, THE GAZETTE OF INDIA (JUNE 2, 2010), <http://www.elaw.org/system/files/National+Green+Tribunal+Act+2010.pdf> (last visited May 17 2011)

process of appeals, the costs associated with bringing a case, the incorporation of a deposit of amount payable for damage to the environment, and the execution of an award or order or decision of a Tribunal. Chapter IV entitled "Penalty" encompasses a section on the penalty for failure to comply with orders of the tribunal, a section on offences by companies, and offences by the government. Chapter V entitled "Miscellaneous" applies to jurisdiction, cognizance of offences, the composition of the membership and staff of the Tribunal, the role of good faith, rule-making abilities, amendments of certain enactments, the power to remove difficulties, and how this law will repeal certain rules and result in savings. Schedule I includes a list of laws that have already been enacted and if any of these laws are triggered, the adjudication of these disputes will occur in the tribunal. Schedule II provides a list of categories of loss, damage and expenses which can be claimed in the way of compensation or relief.

This commentary will examine six aspects of this new law, namely standing to sue, the existence, presence and use of scientific knowledge, effectiveness of the court and/or legislation, procedural elements, access to information, traditional aspects of cost and time saving measures and a historical overview. Although there is not a widely available and vast body of published works which extensively analyzes legislation creating environmental courts and tribunals, there was an extremely informative article entitled "How Green Will be the Green Tribunal?- Comments and Suggestions on the National Green Tribunal Bill, 2009"² written on the National Green Tribunal Bill of 2009 which was the result of a joint effort of multiple members. These members all belonged to what is known today as The Access Initiative – India Coalition [TAI-India] comprised of over 30 individuals and NGOs from across the country. TAI-India is part of

² *How Green Will be the Green Tribunal? Concerns and Suggestions on the National Green Tribunal Bill, 2009*, The Access Initiative, <http://www.elaw.org/system/files/How+Green+Will+be+the+Green+Tribunal.pdf> (last visited May 17 2011)

the global TAI Coalition comprising over 150 civil society groups which works for effective enforcement of Principle 10 of the Rio Declaration i.e., Access to Information; Public Participation; and Access to Justice, in matters concerning the environment.

Access to the Courts/Standing to Sue

The first issue this commentary will address with respect to this legislation and tribunal is whether this legislation will enhance access to the courts (and justice). The first clause of Principle 10 of the Rio Declaration is that: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level."³ The Green Tribunal Act addresses this by defining many categories of a "person" who would have access to the courts.

As indicated in the introduction above, the National Green Tribunal Act provides for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto. "Persons" include (i) an individual, (ii) a Hindu undivided family, (iii) a company, (iv) a firm, (v) an association of persons or a body of individuals, whether incorporated or not (vi) trustee of a trust, and (viii) every artificial judicial person, not falling within any of the preceding sub-clauses.

³ Principle 10 of the Rio Declaration on Environment and Development states the following: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided.", Rio Declaration on Environment and Development, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163> (last visited May 16, 2011)

The tribunal provides access by allowing the enforcement of legal rights to enforcement and giving compensation for damages to persons and property. Persons are clearly defined in the legislation. On the surface, this legislation seems to enhance access to justice by defining six different sub-categories of the term "person." On the other hand, the access to justice seems to be limited since part (ii) of the definition of a person states that a Hindu undivided family qualifies as a person. If this section limits standing exclusively to Hindus as opposed to members of all of the other religions in India, then it would be quite limiting. Also, the term "undivided family" is not defined. Since the definition includes a sub-category for individuals, it appears that individuals are included. However, it is not certain as to whether unmarried couples living together (although rare) or divorced couples or couples in mixed marriages qualify. It would also be helpful to know what is meant by an association of persons and by artificial judicial persons.

Bharat Desai and Balraj Sidhu's perspective on how standing changed with the introduction of the green tribunal is as follows:

As a logical corollary to the activist role pursued by the higher courts, justice's center of gravity shifted from the traditional individual locus standi to community-oriented public interest litigation. The liberalization of the rule of locus standi enabled environmentally conscious and public-spirited individuals or groups easy access to the highest court of India and judge-fashioned remedies.⁴

Scientific Knowledge

The next inquiry addresses the question of whether the primary source material (the National Green Tribunal Act of 2010) facilitates the application of environmental science to decision-making. Generalist judges in the ordinary court do not seem to have sufficient

⁴ Bharat H. Desai and Balraj Sidhu, *On the Quest for Green Courts in India*, JOURNAL OF COURT INNOVATION 92 (2010), http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf (last visited May 18 2011)

experience with the complex laws and principles that form environmental law, and are uncomfortable dealing with highly expert testimony and the necessity of balancing anticipated environmental harm and economic benefits.⁵

The National Green Tribunal Act's Chapter II on the Establishment of the Tribunal demonstrates the attention that was directed towards making sure that scientific knowledge would be applied to the decision-making process. According to Section 4(1) of Chapter II, The Tribunal shall consist of a) a full time chairperson, b) not less than ten but subject to a maximum of twenty full time judicial members as the Central government may from time to time notify and c) not less than ten but subject to a maximum of twenty full time Expert Members as the Central Government may from time to time notify. According to Section 4(2), The Chairperson of the Tribunal may, if considered necessary, invite any one or more person having specialized knowledge and experience in a particular case before the Tribunal to assist the Tribunal in that case. Section 5 expands on the principles in Section 4 by defining in detail the requirements necessary for one to qualify as a chairperson, a judicial member and an expert member. Of most interest to us is the definition of an expert member. Specifically Section 5(2) states that "A person shall not be qualified as an Expert Member, unless he, (a) has a degree in Master of Science (in physical sciences or life sciences) with a Doctorate degree or Master of Engineering or Master of Technology and has an experience of fifteen years in the relevant field including five years practical experience in the field of environment and forests (including pollution control, hazardous substance management, environmental impact assessment, climate change

⁵ See GEORGE PRING & CATHERINE P PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (THE ACCESS INITIATIVE 2009), at 14-16, available at <http://www.accessinitiative.org/resource/greening-justice> and <http://www.law.du.edu/ect-study> (available free of charge electronically at both websites) as cited in Bharat H. Desai and Balraj Sidhu, *On the Quest for Green Courts in India* _JOURNAL OF COURT INNOVATION 88 (2010) , http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf (last visited May 18 2011)

management, biological diversity management and forest conversation) in a reputed National level institution; or (b) has administrative experience of fifteen years including experience of five years in dealing with environmental matters in the Central or State Government or in a reputed National or State level institution.

The detailed criteria necessary to qualify as an expert clearly demonstrates the commitment to ensuring that decisions are grounded in science. The specificity to which the Act indicates what is required of an expert and the stringent requirements applied to this qualification alone demonstrates a willingness and commitment to incorporate sound science into the decision making process. The importance the creators of this legislation gave to the incorporation of science into the decision making policy can be demonstrated also by the fact that in addition to the actual degree that is required, the language also includes that the degree must be from a reputable institution.

Effectiveness

The next factor that must be evaluated is the extent to which the legal process protects nature and improves the environment instead of simply determining that one particular party prevails and the other party does not. The fourth clause of Principle 10 of the Rio Declaration states that, "Effective access to judicial and administrative proceedings, including redress and remedy shall be provided." This subsection of the Rio Declaration is definitely satisfied by the passage of this act. Chapter III, Section 15(1) states that The Tribunal may by an order provide (a) for relief and compensation to the victims of pollution and other environmental damage arising under the enactments specified in Schedule I (including accident occurring while handling any hazardous substance); (b) for restitution of property damaged; and (c) for

restitution of the environment for such area or areas, as the Tribunal may think fit. The rest of Section 15 provides in detail the rules regarding relief, compensation and restitution.

The Green Tribunal Act protects nature in indirect ways. The very fact that more individuals are allowed to bring suit and for a broader set of reasons demonstrates that environmental issues are given greater importance and will be protected in ways that it was not before. The other positive aspect of the Green Tribunal Act is that the decision makers have to be more knowledgeable about environmental issues. Other than broadening channels to the court (which will be discussed in further detail in subsequent paragraphs) and making the qualifications for the decision makers more stringent, there are no other ways to tell whether the environment is actually improved or not. This is one area in which an updated or revised version of the act may want to incorporate concrete measures in order to track and monitor the improvement of the environment as a whole.

Procedural Elements

Procedural issues with respect to the environmental courts and tribunals can be evaluated in a variety of ways. This includes general accessibility, the costs in creating environmental tribunals, the efficiency or lack thereof when multiple states in one country have to create environmental tribunals, the existence of an appellate system, the issue of transparency, the existence of online electronic filing systems to make access to the courts logistically easier, and global transparency as a whole. Since general accessibility was addressed in the section on “access” above, this section will address the other issues raised. The second clause of Principle 10 of the Rio Declaration is that at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities and the opportunity to

participate in the decision making process. The act does not appear to have any language included within it that relates to access to information held by the public authorities. However, the act does provide procedures and details on how one can participate in the decision making process.

The National Green Tribunal Act does not mention the costs involved in creating environmental tribunals nor does it deal with how there will be any kind of uniformity if green tribunals need to be created in multiple states. The appellate system and structure is addressed and is explained with sufficient depth. Section 16 of the National Green Tribunal provides that any person aggrieved by various sections of the National Green Tribunal Act and other laws may within a period of thirty days from the date on which the order or decision or direction or determination is communicated to him, prefer an appeal to the tribunal provided that the tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from filing within the said period, allow it to be filed under this section not exceeding sixty days.

Access to Information

The concept of access to information is that whereby the public is given access to information that is being decided by a particular court or jurisdiction. The third clause of Principle 10 of the Rio Declaration is that "States shall facilitate and encourage public awareness and participation by making information widely available." Again, similar to the case with regard to the second clause of Principle 10, there seems to be missing from the legislation any reference to access to information. The objective of the Aarhus Convention is that in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the

rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.⁶ India's National Green Tribunal Act of 2010 satisfies these objectives in some ways and not in others. With regard to guaranteeing the rights of access to information, there is barely any mention or indication of this within the Act. With regard to public participation in decision-making, this is more clearly defined. The Act clearly identifies ways in which the public can participate by way of how they can bring a case to the Tribunal and how they can work through the system in creative ways if necessary. Finally, I believe that the prong of access to justice in environmental matters is also satisfied since the decision-makers will be knowledgeable with these matters and highly trained in such a way that decisions rendered will be fair and decided by experts in the field.

Traditional Measures

Traditionally, the concerns of courts were that litigation was both time consuming and expensive. The Green Tribunal Act states in Section 18 that the application or appeal filed before the tribunal under this act shall be dealt with by it as expeditiously as possible and endeavor shall be made by it to dispose of the application, or as the case may be, the appeal, finally within six months from the date of filing the application, or as the case may be, the appeal, after providing the parties concerned an opportunity to be heard. With regard to the costs of litigation, Section 23(1) states "While disposing of an application or an appeal under this Act, the Tribunal shall have power to make such order as to costs, as it considers necessary." Section 23(2) provides, "Where the tribunal holds that a claim is not maintainable, or is false or vexatious, and such claim is disallowed, in whole or in part, the Tribunal may, if it so thinks fit,

⁶ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on June 25th 1988, <http://www.unece.org/env/pp/documents/cep43e.pdf> (last visited May 16 2011)

after recording its reasons for holding such claim to be false or vexatious, make an order to award costs, including lost benefits due to any interim injunction.” Another issue in India was that of the length of cases. By way of incorporating the term “expeditious” into this legislation and emphasizing the importance of efficiency, this legislation seeks to address that shortcoming of the judicial system to date.

History

A final factor one must consider when analyzing environmental acts creating environmental tribunals is that of the rationale which led to the creation of the environmental tribunal.

There is a history of quest for environmental courts in India. The Supreme Court first touched upon this question in the Delhi Oleum Gas Leakage case (1986).⁷ It was propelled by the difficulty faced by the court to deal with the technical nature of the case, since it entailed examining the harmful effects of oleum gas, the toxicity of a caustic chlorine plant and other matters concerning the industry. In this case, the Court had to appoint several expert panels as advisors, so that the Court could take a judicial view of the matter to make an appropriate pronouncement and remedial action. But the Court found the ad hoc mechanism of convening technical experts and commissioners as well as expert institutions (such as Central Pollution Control Board or National Environmental Engineering Research Institute) for each case inconvenient. In fact, the Court mooted the idea of a standing “ecological sciences research group” to advise and assist the court as and when required. As such the Court, in its concerted view, also called for the establishment of specialized environmental courts. In its celebrated 1986 judgment, the Court went to great length to make out a case for setting up such specialized environmental courts in India. However, the government did not take it quite seriously, and its resistance to such specialized courts could be attributable to various factors. Therefore, the Supreme Court (as well as several High Courts) resorted to designating a special “green bench” – one that could hear environmental cases on a fixed day – or to assigning all environmental cases to a special judge or judges. For instance, the apex court heard on Friday all pending environmental matters (some of the matters included cases like the Ganges River, the Taj Mahal, and the Shifting of Hazardous Industries from Residential Areas in Delhi that had several municipalities and industries as

⁷ M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 965 as cited in, *Interview by Sara Vinson with Bharat H. Desai: India's National Green Tribunal*, JOURNAL OF COURT INNOVATION 365 (2010), http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf (last visited May 18 2011)

respondents, pitted against the sole petitioner-in-person). In fact, some of these marathon litigations have gone on for many years. Subsequently, there were some half-hearted efforts in this direction such as the 1995 National Environmental Tribunal Act ("NET") and 1997 National Environmental Appellate Tribunal.⁸ Thus, twenty-four years after the original Supreme Court suggestion, the 2010 National Green Tribunal (NGT) Act has been enacted by the Parliament.⁹ It received the Presidential assent on June 2, 2010, and was duly notified on October 18, 2010.

In India's history, there was not one particular court or tribunal in place to address environmental issues. Moreover, the judges who were making the decisions were in no way experts in their field. This legislation not only provided for greater expertise with respect to environmental decision-making but was also sure to repeal environmental laws that would have served a repetitive purpose and incorporate into the act the issues that were dealt with by these previous laws.

⁸ The National Environmental Tribunal Act, No. 27 of 1995; India Code, available at <http://envfor.nic.in/legis/others/tribunal.html> (last visited May 17, 2011); The National Environment Appellate Authority Act, No. 22 of 1997 (March 26th, 1997); India Code, available at <http://envfor.nic.in/legis/others/envapp97.html> (last visited May 17 2011) as cited in *Interview of Professor Bharat H. Desai: India's National Green Tribunal by Sarah Vinson*, JOURNAL OF COURT INNOVATION 365-366 (2010), http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf (last visited May 18 2011)

⁹ The National Green Tribunal Act, (No. 19 of 2010), INDIA CODE, available at <http://www.elaw.org/system/files/National+Green+Tribunal+Act+2010.pdf> (last visited May 17 2011) as cited in *Interview of Professor Bharat H. Desai: India's National Green Tribunal by Sarah Vinson*, JOURNAL OF COURT INNOVATION 366 (2010), http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf (last visited May 18 2011)