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## **THE NATIONAL GREEN TRIBUNAL OF INDIA: A SUSTAINABLE FUTURE THROUGH THE PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW\***

### **ABSTRACT**

Access to environmental justice is the first step to the achievement of environmental justice goals by articulating in the language of equity the assurance of legal standing for all affected and interested parties; right of appeal or review; specialized environmental courts and other practical dispute resolution mechanisms.

In this context, India's commitment to the newly formed National Green Tribunal [NGT] assumes significant practical importance. In seeking a balanced judicial forum that advances green jurisprudence, the NGT is a 'fast-track court' with an open forum having wide powers, staffed by judges and environmental scientific experts. Section 20 of the National Green Tribunal Act 2010 mandates the application of the principles underpinning international environmental law, namely, sustainable development, precautionary and polluter pays principles by the NGT.

This paper addresses the application of these principles in the Indian context, thereby, recognizing its international commitments for environmental protection.

### **Key words:-**

Access Environmental Justice, National Green Tribunal India, Principles of International Environmental Law

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## 1. INTRODUCTION

The globalization of environmental concerns and the internationalization of environmental law have resulted in a significant development of environmental justice discourse.

Environmental justice concerns can be traced in the history of environmental law to key moments that include the Trail Smelter Arbitration in 1941<sup>1</sup>, events in Warren County, North Carolina<sup>2</sup>, nuclear testing at Maralinga and early uranium mining, Australia<sup>3</sup>, salt water infiltration into Dutch agricultural fields from potassium mines in Alsace, France<sup>4</sup> and several other striking events. These environmental struggles expressed within a social justice and civil rights framework helped create a pathway towards environmental justice.

Over time, the concept of environmental justice has been accepted, adopted and applied at the global, regional and national levels, through its ability to metamorphose in the light of the constantly changing political climate and environmental priorities. The discourse and understanding of environmental justice has broadened to include issues of fairness, equity, standing and class recognition of the disadvantaged population and developing countries and meaningful participation of all in the decision-making process to promote environmental governance<sup>5</sup>.

Environmental justice scholarship encapsulates the distribution of environmental benefits and burdens<sup>6</sup>, recognition of oppressed individuals and communities in the political and cultural realms<sup>7</sup> and procedural dimension focusing on participatory mechanisms<sup>8</sup>. The

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\*I thank Professor Robert Lee, Professor of Environmental Law, Exeter Law School, University of Exeter for his helpful comments.

<sup>1</sup> 35, *AJIL* (1941), 684

<sup>2</sup> Dollie Burnwell and Luke Cole, 'Environmental Justice Comes Full Circle: Warren County Before and After' (2007) *Golden Gate University Environmental Law Journal*, 9-10

<sup>3</sup> Brad Jessup, 'The journey of environmental justice through public and international law', in Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge University Press 2012), 50

<sup>4</sup> Alexandre Kiss and Dinah Shelton, *International Environmental Law* (United Nations Environment Programme 2003), 105

<sup>5</sup> See Jessup, above n. 3 at 50-60; Julian Agyeman, Robert Bullard and Bob Evans, *Just Sustainabilities: Development in an Unequal World* (MIT Press 2003)

<sup>6</sup> Laura Pulido, *Environmentalism and Economic Justice* (University of Arizona Press 1996), xv-xvi; Harry Brighouse, *Justice* (Cambridge: Polity 2004), 2; Michael Walzer, *Spheres of Justice* (University of California Press 1983), 6

<sup>7</sup> Iris Young, *Justice and the Politics of Difference* (1990) Princeton University Press, 22; Paul Taylor, *Respect for Nature: A Theory of Environmental Ethics* Princeton University Press; Axel Honneth, 'Integrity and Disrespect: Principles of Morality Based on the Theory of Recognition' 20(2) *Political Theory*, 187-201

scope of this paper, however, is confined to a strong procedural dimension of ‘reclaiming democracy’<sup>9</sup> through ‘deliberative and democratic participation and the construction of capabilities among individuals, groups and non-human parts of nature’<sup>10</sup>. In this context, access to justice through an accessible judicial mechanism as a means to redress environmental damage or harm and the protection and enforcement of legitimate interests assumes importance.

The procedural element is ubiquitously embedded in the Stockholm<sup>11</sup> and Rio Declarations<sup>12</sup> and the Aarhus Convention.<sup>13</sup> Access to environmental justice is the first step to the achievement of environmental justice goals by articulating in the language of equity the assurance of legal standing for all affected and interested parties; right of appeal or review; specialized environmental courts and other practical dispute resolution mechanisms. Several international declarations and institutions also call for judicial specialization, envisaging expert courts and trained judges and lawyers in environmental matters<sup>14</sup>. They seek to strengthen the capacity building among individuals within the decision-making process at national, regional and global levels. In this context, India’s commitment to the Green Court assumes significant practical importance.

This paper focuses on the application of the principles of international environmental law at the domestic level by the National Green Tribunal [NGT], India. The paper is divided into three parts- the first part offers a brief account of the genesis and establishment of NGT, India; the second part analyses the application of the international environmental law principles in conjunction with the domestic right to environment at the national level and reviews appropriate case illustrations; the third part is the conclusion.

## 2. THE NATIONAL GREEN TRIBUNAL, INDIA

### 2.1 The Genesis

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<sup>8</sup> Ryan Holifield, Michael Porter and Gordon Walker, *Spaces of Environmental Justice* ( John Wiley and Sons 2011) 10; David Schlosberg, *Defining Environmental Justice: Theories, Movements and Nature* (Oxford University Press 2007) 25-29

<sup>9</sup> Kristin Shrader Frechette, *Environmental Justice: Creating Equality, Reclaiming Democracy* ( Oxford University Press 2002)

<sup>10</sup> See Schlosberg, above n. 8 ; David Schlosberg, ‘Reconceiving Environmental Justice: Global Movements and Political Theories’ 13 *Environmental Politics* (2004) 517-540

<sup>11</sup> The United Nations Conference on the Human Environment, U N Doc. A/Conf.48/14/Rev.1 Articles. 1 and 22

<sup>12</sup> The United Nations Conference on Environment and Development, U N Doc. A/CONF.151/5/Rev.1, 13 June 1992 Article 10

<sup>13</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (entry into force 30.10.2001) Articles 1 and 9

<sup>14</sup> Nicholas A Robinson, ‘Ensuring Access to Justice through Environmental Courts’ 29 *Pace Env’tl.L.Rev* (2012) 363-395 at 374; The Global Judges Symposium on Sustainable Development and the Role of Law, Johannesburg (18-20 August 2002);

<http://www.unep.org/delc/judgesprogramme/GlobalJudgesSymposium/tabid/106158/Default.aspx> accessed 25.2.2014; <http://www.adb.org/publications/south-asia-conference-environmental-justice> accessed 26.2.2014; Asian Development Bank, (2012). Environmental Governance and the Courts in Asia .Law and Policy Reform, Brief 1, 1; <http://www.adb.org/publications/south-asia-conference-environmental-justice>

India's environmental justice discourse resonated as a result of a growing judicial realisation and appreciation of the connection between human rights and environmental protection. The deficiencies in environmental regulations, contradictions and gaps in institutional mechanisms, inefficiencies in administrative enforcement, multi-layered corruption, including political corruption and personal gain collectively prompted the Supreme Court of India into the de-facto role of a caretaker of the environment through public interest litigation [PIL]<sup>15</sup>. A new environmental jurisprudence built on innovative substantive features [right to a healthy environment, derivative principles of international environmental law, strict compliance of regulatory norms] and procedural features [broader and enhanced standing, fact finding commissions, continuing mandamus] promoted dynamism and capability<sup>16</sup>, thereby, providing victims of environmental degradation with a route to access justice in a participatory manner. Thus, judicial activism promoted environmental justice through judge-fashioned processes and remedies. These are, as Ellis says, 'redistributive, progressive and just.'<sup>17</sup>

The active engagement of the Indian judiciary in imparting environmental justice, nonetheless, raised concerns about the effectiveness of PIL in relation to rapidly increasing numbers of petitions, complex technical and scientific issues, unrealistic court directions, individual judicial preferences, more often personality driven rather than reflecting collective institutionalised adjudication and also the issue of creeping jurisdiction.<sup>18</sup> The Law Commission of India in its One Hundred and Eighty Sixth Report on 'Proposal to Constitute Environment Courts'<sup>19</sup> strongly advocated the establishment of 'Environment Courts' keeping in mind the following considerations:

- (a) The uncertainties of scientific conclusions and the need to provide, not only expert advice from the Bar but also a system of independent expert advice to the Bench itself;
- (b) The present inadequacy of the knowledge of Judges on the scientific and technical aspects of environmental issues, such as, whether the levels of pollution in a local area are

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<sup>15</sup> Gitanjali Nain Gill, 'Human Rights and the Environment in India: Access through Public Interest Litigation' 14 *Environmental Law Review* (2012) 201.; Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India* (OUP 2001) 2.; S. P. Sathe, *Judicial Activism in India Transgressing Borders and Enforcing Limits* (OUP 2002) 210

<sup>16</sup> See generally, Amartya Sen and Martha Nussbaum who developed 'capability approach', envisaging both the qualities and capabilities held by people and their ability to express and exercise those capabilities in a functioning life. Amartya Sen, *Commodities and Capabilities* (OUP 1999); Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press 2006); Martha Nussbaum and Amartya Sen, *The Quality of Life* ( OUP 1992)

<sup>17</sup> Geraint Ellis, 'Discourses of Objection: Towards an Understanding of Third-Party Rights in Planning', 36 *Environmental and Planning A* (2004) p. 1553

<sup>18</sup> See Gill, above n. 15; L. Rajamani, 'Public Interest Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19(3) *Journal of Environmental Law* 293; B.N. Srikrishna, 'Judicial Activism- Judges as Social Engineers, Skinning a Cat' (2005) 8 *SCCJ* 3

<sup>19</sup> Law Commission of India, One Hundred and Eight Sixth Report, (2003) 8-9

- within permissible limits or whether higher standards of permissible limits of pollution require to be set up;
- (c) The need to maintain a proper balance between sustainable development and control/regulation of pollution by industries;
  - (d) The need to strike a balance between closure of polluting industries and reducing or avoiding unemployment or loss of livelihood;
  - (e) The need to make a final appellate view at the level of each State on decisions regarding 'environmental impact assessment';
  - (f) The need to develop a jurisprudence in this branch of law which is also in accord with scientific, technological developments and international treaties, conventions or decisions; and
  - (g) To achieve the objectives of Art. 21, 47, 48A and 51A (g) of the Constitution of India by means of a fair, fast and satisfactory judicial procedure

The Law Commission of India was influenced by decisions of the Supreme Court of India that in dicta advocated the establishment of environmental courts. In the judgments of the Supreme Court of India in *A.P. Pollution Control Board vs. M.V. Nayudu*<sup>20</sup>, *M.C. Mehta vs. Union of India*<sup>21</sup> and *Indian Council for Enviro-Legal Action vs. Union of India*<sup>22</sup> the Court referred to the need to establish environmental courts. These courts would benefit from the expert advice of environmental scientists and technically qualified persons, as part of the judicial process.

Accordingly, the Indian Parliament passed the National Green Tribunal Act in June 2010<sup>23</sup>.

## 2.2 The Establishment of National Green Tribunal

The NGT Act 2010 institutionalized the procedural element of environmental justice by establishing the NGT, thereby, enhancing the principles of environmental democracy that include fairness, public participation, transparency and accountability.

The NGT is a creation of a statute and thus, its jurisdiction, powers and procedures are construed with reference to the language of its provisions. Being a statutory body, it is bound and controlled by the provisions of the statute i.e the NGT Act 2010.<sup>24</sup>

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<sup>20</sup> 1999 (2) SCC 718 and 2001 (2) SCC 62

<sup>21</sup> AIR 1987 SC 965

<sup>22</sup> 1996(3) SCC 212

<sup>23</sup> The National Green Tribunal Act, 2010, The Gazette of India Extraordinary (No. 19 Of 2010); Gitanjali Nain Gill, 'A Green Tribunal for India' 22 (3) *Journal of Environmental Law* (2010) 466-468

<sup>24</sup> *M.P. Pollution Control Board v. Commissioner Municipal Corporation Bhopal* Judgment dated August 8, 2013

The NGT is empowered to decide cases relating to environmental protection and the conservation of forests and other natural resources including enforcement of any legal right relating to the environment and give relief and compensation for damages to persons and property. The NGT was established on October 18, 2010 as a specialized body exercising the jurisdiction, powers and authority to promote the efficient disposal of environmental cases.<sup>25</sup> The principal bench sits in New Delhi although Bhopal was mooted earlier in recognition of the environmental industrial disaster of 1984.<sup>26</sup> The NGT held its first hearing on May 25, 2011 and became fully operational on the 4<sup>th</sup> July, 2011.<sup>27</sup> Subsequently, the Ministry of Environment and Forests, Government of India, issued a Notification dated 17<sup>th</sup> August 2011 whereby regional benches of the NGT were appointed thereby extending jurisdiction throughout India.<sup>28</sup> The effect is a reformist approach through a regional and circuit bench development that enables access for aggrieved parties, an aspect discussed later in this article. The courts have gone to the people rather than expecting the people to travel to the courts.<sup>29</sup> The principal bench, in Delhi covers the northern zone<sup>30</sup>; the Pune Bench handles the western territory<sup>31</sup>; the Central Zone Bench is based in Bhopal<sup>32</sup>; Chennai covers the southern part of India<sup>33</sup>; and the Kolkata bench is responsible for the eastern region of India<sup>34</sup>. Currently, there are five benches dealing exclusively with environmental issues. All benches are operational.

A unique feature of the NGT's adjudicative process involves legally qualified judges working alongside scientific experts with environmental knowledge as joint decision makers of equal standing.<sup>35</sup> The benefit of this multi-faceted and multi-skilled body produces a coherent and effective institutional mechanism to apply complex laws and principles in a uniform and

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<sup>25</sup> Ministry of Environment and Forests, Government of India, Notification 5th May 2011 S.O.1003 E

<sup>26</sup> Statement made by Jairam Ramesh, Former Minister of State of the Ministry of Environment and Forests in the Indian Parliament on 5<sup>th</sup> May 2010, The Rajya Sabha Debates, p 246

<sup>27</sup> [http://www.wwfindia.org/about\\_wwf/enablers/cel/national\\_green\\_tribunal/](http://www.wwfindia.org/about_wwf/enablers/cel/national_green_tribunal/)

<sup>28</sup> Ministry of Environment and Forests, Government of India, Notification 17th August 2011 S.O.1908 E

<sup>29</sup> See, above n. 27

<sup>30</sup> The northern zone covers the states of Uttar Pradesh, Uttarakhand, Punjab, Haryana, Himachal Pradesh, National Capital Territory of Delhi and Union Territory of Delhi

<sup>31</sup> The west includes Maharashtra, Gujarat, Goa with Union Territories of Daman and Diu and Dadar and Nagar Haveli

<sup>32</sup> The central zone covers the states of Madhya Pradesh, Rajasthan and Chattisgarh

<sup>33</sup> The southern zone serves the areas of Kerala, Tamil Nadu, Andhra Pradesh, Karnataka, Union Territories of Puducherry and Lakshadweep

<sup>34</sup> The east covers West Bengal, Orissa, Bihar, Jharkhand and the seven sister States of the North-Eastern region, Sikkim, Andaman and the Nicobar Islands

<sup>35</sup> Section 4(1) of the NGT Act 2010 provides that the NGT consists of a full time Chairperson, not less than ten but subject to a maximum of twenty full time judicial and expert members. Section 5(2) of the NGT Act 2010 spells out that the judicial members will have requisite legal expertise and experience and the expert members will include either technical experts from life sciences, physical science, engineering or technology. For example, Mr Justice Swatanter Kumar, the Chairperson of NGT was a former judge of the Supreme Court of India and Mr Professor R Nagendran, an expert member, worked as a professor environmental science/engineering

consistent manner whilst simultaneously re-shaping the approach to solve the environmental problem at its source rather being limited to pre-determined remedies. The combination of legal, scientific and technical expertise has a dynamic impact on the content and development of environmental policies and law. It moves 'adjudication' beyond the 'courtroom door' in its implicit creation of scientifically justified policy through the use of strong dicta. For instance, in *Vimal Bhai v Ministry of Environment and Forests*<sup>36</sup> the Tribunal issued directions in matters relating to the grant of forest clearance in order to build a dam on river Alaknanda for the purpose of generating hydroelectric power. The Tribunal identified the current limitation of the environmental impact assessment procedure. It suggested that the procedure was narrowly based and that in future the Ministry should take account of cumulative impact assessment reports that integrate physical, biological and social impacts in a comprehensive manner before granting any forest clearance. A further illustration of policy making is evidenced in the 2011 case of *Krishi Vigyan Arogya Sanstha v. Ministry of Environment and Forests*, where the Tribunal issued directions instituting a scientific study dealing with nuclear radiation with reference to coal ash generated by thermal power projects. The Tribunal reviewed the cumulative effect of a number of thermal power projects located in the area on human habitation and environment and ecology grounds. It prescribed national standards as to permissible levels of nuclear radiation in residential, industrial and ecologically sensitive areas of India and synchronized the commissioning of the thermal power project with that of a sewage waste water treatment plant. The treated water was proposed to be used for the operation of the project, failing which no consent to operate was to be issued by the pollution control boards. Further, all future projects required the project proponent to furnish details of possible nuclear radio activity and the levels of the coal proposed to be used for the thermal power plant.

The NGT has wide jurisdiction in relation to environmental matters. The pleadings are in the form of original, appellate, review and miscellaneous petitions. Section 14 of the NGT Act 2010 empowers the Tribunal to entertain original applications covering all civil cases involving a substantial question of environment and which arises out of the enactments specified in Schedule 1 of the Act.<sup>37</sup> Civil cases within its ambit include all legal proceedings except criminal cases which are governed by the provisions of the Criminal Procedure Code.<sup>38</sup> A substantial question of the environment is an expression of wide magnitude to cover a question which is debatable, not previously settled and must have a material bearing on the case and its issues relating to the environment. The NGT Act 2010 classifies a

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<sup>36</sup> Judgment dated December 14, 2011

<sup>37</sup> The enactments in Schedule 1 include The Water (Prevention and Control of Pollution) Act 1974; The Water (Prevention and Control of Pollution) Cess Act 1977; The Forests (Conservation) Act 1980; The Air (Prevention and Control of Pollution) Act 1981; The Environment (Protection) Act 1986; The Public Liability Insurance Act 1981 and The Biological Diversity Act 2002

<sup>38</sup> *M.P. Pollution Control Board v. Staller House* Judgment dated August 8, 2013



substantial question relating to the environment to include statutory violation of environmental obligations and environmental consequences of specific activity or pollution.<sup>39</sup> The Tribunal is vested with appellate jurisdiction under Section 16 of the NGT Act 2010 against orders or decisions under the enactments specified in Schedule 1.<sup>40</sup> The appeal has to be filed before the Tribunal within thirty days from the date on which order or decision or determination was communicated to an aggrieved party. However, the time limitation clause may be further extended to a period not exceeding 60 days provided that the Tribunal is satisfied that the appellant was prevented by a sufficient cause from filing the appeal. The appellate jurisdiction of NGT can only be invoked provided the appellant has exhausted all the appeal forums available under the Act under which order has been passed. The Tribunal cannot be approached directly whatever may be the merits and question of law raised and arise for consideration.<sup>41</sup> The Tribunal can review its decision under Section 19 (f) of the NGT Act 2010. The scope of the review application is limited in nature and cannot be treated as an appeal. The review application can only be entertained when there is mistake or error apparent on face of the record or when some material fact is brought to the notice of Tribunal which is bonafide or any sufficient reason.<sup>42</sup> Miscellaneous applications are also entertained by the NGT. The Tribunal may pass an interim order (including granting an injunction or stay) after providing the parties concerned an opportunity to be heard on any application made or appeal filed under the Act.<sup>43</sup>

One feature of the NGT is its ability to fast track and decide cases within six months from the date of filing the application or appeal.<sup>44</sup> This contrasts with both the historic<sup>45</sup> and contemporary levels of court clogging and delays<sup>46</sup> that are unfortunately powerful features of the Indian court system. The initial filing fee for application or appeal is ₹10, thereby, providing access to justice for all potential aggrieved parties.<sup>47</sup>

The successful establishment of NGT encouraged the Supreme Court of India to review its PIL environmental caseload and its limited environmental expertise. In 2012, the Supreme

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<sup>39</sup> Section 2(m) NGT Act 2010

<sup>40</sup> See, above n. 37

<sup>41</sup> *M/s.P. Manokaran Power Loom v. Tamil Nadu Pollution Control Board* Judgment dated February 15, 2012

<sup>42</sup> *Nisarga Nature Club v. S.B. Prabhudessai* Judgment dated May 31, 2013

<sup>43</sup> Section 19(j) NGT Act 2010; *R Veermani v. Secretary, Public Works Department, Chennai* Judgment dated February 6, 2013

<sup>44</sup> Section 18(3), NGT Act 2010

<sup>45</sup> Robert S Moog, 'Delays in the Indian Court System: Why the Judges Don't take Control' (1992) 16 *Justice System Journal*, 19-36.; See also, Mark Galanter, *Law and Society in Modern India* (New Delhi: OUP 1989); Law Commission of India, *Delay and Arrears in Trial Courts* 77th Report (1978)

<sup>46</sup> The Lok Sabha Debates, 15<sup>th</sup> March 2010; Mr Jairam Ramesh, Former Minister of State of Ministry of Environment and Forests stated that there were over 5,600 cases pending before the judiciary for final disposal

<sup>47</sup> Rule 12, National Green Tribunal (Practices and Procedure) Rules 2011

Court of India in a PIL case<sup>48</sup> transferred all environmental cases both active and prospective to the NGT in order to render expeditious and specialized judgments and avoid the likelihood of conflicts of orders between High Courts and the NGT. Further, the High Courts were advised by the Supreme Court, at their discretion, to transfer to the Tribunal those environmental cases filed and pending prior to the coming into force the NGT Act.

### 3. APPLYING THE PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW INTO INDIAN JURISDICTION

International treaties and agreements call on states to take appropriate action in domestic legal systems to enforce the laws they enact pursuant to international obligations.

The constitutional provisions of India mandate the constituent states to foster respect for international law and treaty obligations.<sup>49</sup> Further the Constitution confers plenary powers on Parliament to enter into treaties and agreements and enact the necessary legislation.<sup>50</sup>

The scope and ambit of international law in the Indian context has been explained in the following terms:

“ international law today is not confined to regulating the relation between the states. Scope continues to extend. Today matters of social concerns, such as, health, education and economics apart from human rights fall within the ambit of international regulations. International law is more than ever aimed at individuals. It is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law.”<sup>51</sup>

Recognizing the importance of promoting international obligations under environmental conventions and articulating the commitment of being a ‘good international citizen’<sup>52</sup>, the NGT Act 2010 agrees to implement the decisions adopted at the Stockholm Conference 1972 and the Rio Conference 1992.<sup>53</sup> Significantly, section 20 of the NGT Act mandates the Tribunal to apply the principles of sustainable development, the precautionary and polluter

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<sup>48</sup> *Bhopal Gas Peedith Mahila Udyog Sangathan v Union of India* Order dated August 9 2012. The Supreme Court Bench comprised of Chief Justice of India, S.H. Kapadia and Justices A. K. Patnaik and Swatanter Kumar. Shortly, thereafter, Justice Swatanter Kumar retired from the Supreme Court and took up his appointment as the Chairperson, NGT, India

<sup>49</sup> Article 51 of the Constitution of India states “the State shall endeavour to- (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and (d) encourage settlement of international disputes by arbitration.”

<sup>50</sup> Article 253 of the Constitution of India states “ Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.”

<sup>51</sup> *People’s Union for Civil Liberties v Union of India* AIR 1997 SC 568.

<sup>52</sup> River Cordes- Holland, ‘The national interest or good international citizenship? Australia and its approach to international and public climate law’ in Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge University Press 2012) 288

<sup>53</sup> Preamble, NGT Act 2010

pays principles while passing any order or decision or award<sup>54</sup>. These principles of international environmental law are read in conjunction with the domestic right to an environment as recognized in the preamble of the Act, thereby, advancing both national and global interests.

In *Jan Chetna v Ministry of Environment and Forests*<sup>55</sup> the Tribunal recapitulated the principles of international environmental law and observed 'the concept of sustainable development was given a definite shape in 1987 by the World Commission on Environment and Development in its report called 'Our Common Future'. In 1991, the World Conservation Union, United Nations Environment Programme and World Wide Fund for Nature, jointly came out with a document called 'Caring for the Earth' which is a strategy for sustainable living. Finally, came the Earth Summit held in June 1992 at Rio... The Supreme Court of India noted that some of the salient principles of 'sustainable development' as culled-out from Brundtland Report and other international documents are inter-generational equity, use and conservation of natural resources, environmental protection, the precautionary principle, polluter pays principle, obligation to assist and cooperate, eradication of poverty and financial assistance to the developing countries. The precautionary and polluter pays principles are essential features of sustainable development and are part of the environment law of the country.'<sup>56</sup> Thus, the Tribunal is obliged to adhere and apply to the above-mentioned principles for the effective implementation of environmental rights and duties in the Indian context<sup>57</sup>.

The paper specifically examines the application of the above-mentioned principles as spelled out in the NGT Act 2010, which are as follows:

### **3.1 The Principles of Environmental Protection and Conservation**

The use of general legal principles in international environmental law provides the orientation and direction to which positive law must conform: a rationale for the law without it constituting a binding norm. The persistent reference to the general principles in preambles to the treaties and other international acts highlights the broad support of the nation states to these principles despite having 'indeterminate content, degree of abstraction and uncertainty.'<sup>58</sup> The general principles may appear in constitutions, basic law and also in judicial construction.

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<sup>54</sup> *Rana Sengupta v Union of India* Judgment dated March 22, 2013 para 23

<sup>55</sup> Judgment dated February 9, 2012 para 19

<sup>56</sup> See, generally the judgments of the Supreme Court of India- *Indian Council for Enviro-Legal Action v Union of India* AIR 1996 SC 1446; *A P Pollution Control Board v Prof M V Nayadu* AIR 1999 SC 812; *Intellectual Forum, Tirupathi v State of A.P* AIR 2006 SC 1350; *Narmada Bachao Andolan v Union of India* AIR 2000 SC 3751

<sup>57</sup> *Jeet Singh Kanwar v Union of India* Judgment dated April 16 2013

<sup>58</sup> See Kiss and Shelton, above n. 4 at 113; Philippe Sands and Jacqueline Peel, with Andriana Fabra and Ruth MacKenzie, *Principles of International Environmental Law* (Cambridge University Press 2012) 187

### 3.1.1 The Principle of Protection

The principle of protection has a strong presence in international texts and practices. According to the American Heritage dictionary, the word 'protect' is defined as 'to keep from being damaged, attacked, stolen or injured.'<sup>59</sup> Environmental protection implies abstaining from harmful activities and adopting affirmative measures to ensure that environmental deterioration does not occur. The OECD Glossary of Statistical Terms<sup>60</sup> defines environmental protection in a comprehensive manner to include 'any activity to maintain or restore the quality of environmental media through preventing the emission of pollutants or reducing the presence of polluting substances in environmental media. It may consist of changes in characteristics of goods and services; changes in consumption patterns; changes in production techniques; treatment or disposal of residuals in separate environmental protection facilities; recycling; and prevention of degradation of the landscape and ecosystem.'

The NGT explained the principle of environmental protection by interpreting its enabling Act in a manner that achieves better results for the environment and ecology by insisting on the adoption of robust enviro-friendly measures. In *M/S Gokulam Blue Metals v Tamil Nadu Pollution Control Board*<sup>61</sup>, the NGT issued an order against the appellants [M/S Gokulam Blue Metals] engaged in the business of blue metal involving the process of stone crushing and directed the immediate closure of the business. According to the Tribunal the anti-air pollution facilities were either damaged or not installed thus causing excessive air pollution and excessive harm. Measures such as jaw crushers and rotary screens were found to be in a damaged condition. No water sprinkler was provided to suppress dust emission neither at the jaw crusher nor other vulnerable areas in the premises. The industry was ordered to make the necessary arrangements to install air pollution control measures and on the compliance with the direction, the unit was entitled to run.

In *D B Nevatia v State of Maharashtra*<sup>62</sup> the Tribunal expressed its concern over the vehicular noise caused by the unrestricted use of sirens and multi-tone horns having unspecified standards being fitted in vehicles, including ambulances, government and police vehicles. The noise pollution has an adverse impact on the health and well-being of the public. Noise has both auditory and non-auditory effects depending upon the intensity and the duration of noise level. It affects sleep, hearing, mental and physical health. Accordingly, the Tribunal gave directions to both the federal and state government authorities to take corrective steps. The federal government, namely, the Ministry of Road Transport and Highways, Government of India was directed to provide source specific standards for sirens

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<sup>59</sup> <http://ahdictionary.com/word/search.html?q=protect> accessed 10.1.2014

<sup>60</sup> <http://stats.oecd.org/glossary/detail.asp?ID=836> accessed 10.1.2014

<sup>61</sup> Judgment dated July 12 2013

<sup>62</sup> Judgment dated January 9 2013

and multi-tone vehicles within a period of three months from the date of the order for compliance with the ambient air quality standards under the Noise Pollution [Regulation and Control Rules] 2000. The state government authorities, namely, State of Maharashtra's Transport Department and Pollution Control Board were required to take adequate steps to notify these standards within one month from the date of notification of the Ministry of Road Transport and Highways.

Administrative delay is one of the biggest challenges for India's environmental governance causing frustration and inaction thereby jeopardizing environmental justice. Ironically, while the NGT wanted the pollution regulators to frame guidelines for sirens and multi-tone horns at the earliest, the pollution regulators failed to respond within the stated timescale. Instead, they delayed their first meeting for a year. It took place on 14<sup>th</sup> January 2014 and no time scale is currently available for setting and publishing the required source specific standards.<sup>63</sup>

### 3.1.2 The Principle of Conservation

The dictionary meaning of 'conservation' and 'conserve' is to keep in safety or from harm, decay or loss; to preserve in being.<sup>64</sup> The IUCN World Conservation Strategy demonstrates the conservation principle in establishing as its objectives: maintaining essential ecological processes and life support systems; preserving genetic diversity; and achieving sustainable utilization of species and ecosystems.<sup>65</sup> The Legal Expert Group of the World Commission on Environment and Development<sup>66</sup> defined 'conservation' as '[the] management of human use of a natural resource or the environment in such a manner that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations. It embraces preservation, maintenance, sustainable utilisation, restoration and enhancement of a natural resource or the environment.'

The NGT's approach towards the principle of conservation has been matched by integrating the above-mentioned definitions as Birnie<sup>67</sup> states 'the classic elements of protection and preservation, including restoration, and the safeguarding of ecological processes and genetic diversity besides management of natural resources in order to sustain their maintenance by sustainable utilization'. The broadened perception and treatment to conservation has given effect to the doctrine of public trust<sup>68</sup> as an affirmation of state

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<sup>63</sup> <http://timesofindia.indiatimes.com/city/mumbai/Pollution-board-appointed-panel-to-set-standards-for-horns-sirens/articleshow/28532204.cms> accessed 20.2.2014

<sup>64</sup> <http://www.oxforddictionaries.com/definition/english/conserve> accessed 11.1.2014

<sup>65</sup> <http://data.iucn.org/dbtw-wpd/html/wcs-004/cover.html> accessed 12.1.2014.

<sup>66</sup> See Sands and Peel, above n. 58 at 212

<sup>67</sup> Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press 2009) 590

<sup>68</sup> Joseph L Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', 68 (3) (1) *Michigan Law Review* 471 (1970) 471-566

power to conserve the natural resources meant for public use and enjoyment within a rights and justice discourse. The principle of inter-generational equity<sup>69</sup> underpinning international environmental law has also been absorbed into this doctrine. The state's responsibility to safeguard the natural resources must be for the benefit of the present and future generations through careful planning and management in an objective manner.

The case of *Goa Foundation v Union of India*<sup>70</sup> is illustrative of the principle of conservation. A case was filed by two NGOs, Goa Foundation and Peaceful Society, Goa. They sought directions affecting the state government to take steps for the conservation and protection of the Western Ghats as directed by the high powered panel known as the Western Ghats Ecology Expert Panel [WGEEP]. The Western Ghats are a treasure trove of biological diversity in India, recognised as among the several global 'hotspots of biodiversity.' The Western Ghats are considered to be a repository of endemic, rare and endangered flora and fauna. The largest global populations of Asian elephants and other mammals such as tigers, dhole and gaur are located in this region. The Ghats also support a number of wild relatives of cultivated plants, including pepper, cardamom, mango, jackfruit and plantain. The Ghats are areas of major plantations including tea, coffee, rubber and various spices. The region encompasses precipitous mountains, deep valleys and gorges covered with thick forest. The Union of India maintained that the case could not be entertained by the Tribunal. It argued that the NGT lacked jurisdiction to issue directions as the WGEEP Report was pending for consideration before the Ministry of Environment.

The five member bench headed by Justice Swatanter Kumar, the NGT Chairperson, observed 'it is indisputable and, in fact, an unquestionable fact that the Western Ghats are ecologically sensitive zones. They are required to be conserved and protected. There is a statutory obligation upon the state to protect the environment and ecology of these Western Ghats and to ensure that they are not degraded. Further, the very preamble of the NGT Act 2010 is a sufficient indicator of the jurisdiction that is vested in the Tribunal. This is the first indicator of the legislative intent which provides that a case could relate to environmental protection, conservation of forests and other natural resources or even enforcement of legal rights relating to environment and other matters mentioned thereto. Environmental protection and conservation is not only the obligation of the state but in fact all concerned.'<sup>71</sup>

Accepting the contention of the NGOs, the Tribunal recognized the public trust doctrine requiring the authorities to maintain and ensure environmental equilibrium. It further recognized the state is the trustee of all natural resources which are by nature meant for

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<sup>69</sup> Edith Brown Weiss, 'The Planetary Trust: Conservation and Intergenerational Equity' (1984) 11 *Ecology Law Quarterly* 495-582

<sup>70</sup> Judgment dated July 18 2013

<sup>71</sup> *Ibid* para 17

public use and enjoyment. The public at large is the beneficiary of the sea-shore, running water, air, forests and ecologically fragile lands. The state as a trustee has a legal duty to protect the natural resources in a prudent manner. Non-performance of the statutory obligation attracted the jurisdiction of the Tribunal under the NGT Act.

This paper suggests that the state took a position detrimental to the conservation and protection of the World Heritage Ghats. Instead of opposing the petition on the ground of jurisdictional error, the state should have used it as an opportunity to develop and apply the principle of eco-centrism as opposed to anthropocentrism. Eco-centrism assumes a nature centred approach where humans are part of nature and the non-human has an intrinsic value. Human interests do not take automatic precedence and humans have obligations to non-humans independently of human interest. Eco-centrism, thus, is life-centred, nature centred where nature includes both human and non-human.<sup>72</sup> Thus, the adoption of an eco-centric approach and a related ecological ethic would have prioritised and encouraged the development and enforcement of species protection law in the discourse of environmental justice, or what some philosophers, scholars and green environmentalist term as 'ecological justice.'<sup>73</sup>

It is relevant to mention a more recent example where in the Supreme Court of India directed the government to identify all endangered species of flora and fauna, study their needs and survey environs and introduce exclusive parliamentary legislation related to endangered species conservation. In the *Centre for Environmental Law WWF-1 v Union of India*<sup>74</sup>, the Supreme Court acknowledged the 'intrinsic worth of species' rooted in eco-centrism which supports conservation of all wildlife form, not just those which are of instrumental value to humans but those which have intrinsic value.

The Kaziranga National Park case is another illustration of the Tribunal's approach towards the protection of the environment, ecology, biodiversity and adverse impacts on flora and fauna vis-à-vis conservation of forests and other natural resources. In *Rohit Choudhary v Union of India*<sup>75</sup>, the Tribunal ordered the closure of unregulated and mining activities permitted in and around Kaziranga National Park, as they not only threatened the eco-sensitive zone, but also the survival and existence of rhinos, elephants and other wildlife species, the gene pool reserves and vegetation. The National Park has declared a World Heritage site by UNESCO. The author argues that judgments such as the Kaziranga National Park case reflect a move towards a new understanding of environmental justice. It emphasises species existence and conservation, whether humans deem them worthy or not. It is especially important for countries such as India where eco-centric morality has

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<sup>72</sup> *T N Godavarman Thirumulpad v Union of India* 2012 (3) SCC 277

<sup>73</sup> See Jessup n. 3, above p. 65

<sup>74</sup> Order dated April 15 2013

<sup>75</sup> Judgment dated September 7 2012

been eroded in the quest for economic prosperity, apart from having serious implications for distributive justice.

### 3.2 The Right to an Environment

Recognition of the right to an environment, an emotive entitlement, has influenced the development of law within nations, thereby affecting constitutions, legislation and jurisprudence. Principle 1 of the Stockholm Declaration 1972 recognizes the right of individuals to an adequate environment but stops short of proclaiming the right to an environment. On the other hand the right to an environment was neither explicitly included nor endorsed in the Rio Declaration 1992 and 2002 World Summit on Sustainable Development, thereby, indicating uncertainty and debate.<sup>76</sup>

The right to an environment is deeply problematic given that it is characterized by 'an undefined content, variable and constant changing technical requirements, complicated temporal and geographical elements, vast territorial scope and objectivity claims.'<sup>77</sup> Despite the variability of implementation demands, the right to an environment has been hegemonic in terms of its inclusion in more than one hundred national constitutions and has been increasingly applied in national court systems.<sup>78</sup>

The Supreme Court of India has articulated the right to an environment by providing an expansive interpretation of the term 'life' to include not only simple physical existence but also quality of life. For the court, "enjoyment of life including the right to live with dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation, without which the life cannot be enjoyed."<sup>79</sup> The judicial grammar of interpretation has preserved the link between life and a healthy environment and successfully placed human rights within the environmental discourse. This recognition and convergence will not halt the debate as to whether such a move serves to enhance environmental protection for its own sake or simply furthers the anthropocentric approach.

The NGT Act 2010 in its preamble section recognizes the judicial exegesis of the right to a healthy environment as part of the right to life. The preamble of a statute is an admissible aid to the construction aimed to express the scope, object and purpose of the Act more

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<sup>76</sup> David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) 90

<sup>77</sup> See Kiss and Shelton, above n. 4 at 394-395 and 402-404; Lavanya Rajamani, 'The Increasing Currency and Relevance of Right-based Perspective in the International Negotiation on Climate Change', 22 (3) *Journal of Environmental Law* 391 (2010) 409; Douglas Korsah- Brown, Environment, 'Human Rights and Mining Conflicts in Ghana' in Lyuba Zarsky (ed), *Human Rights and the Environment* (Earthscan Publications Ltd 2002) 81

<sup>78</sup> See Boyd, above n. 76 at 45-77

<sup>79</sup> *Virender Gaur v State of Haryana* (1995) 2 SCC 577; *Francis Coralie v Delhi Administration* AIR 1981 SC 746



comprehensively than the long title. The preamble acts as a precept to gather the legislative intention and helps in giving prudent legislative interpretation to its provisions in order to achieve the objective of the Act.<sup>80</sup>

In light of the language of the Act's preamble, the NGT in the case of *Motion v State of Himachal Pradesh*<sup>81</sup> observed "causing environmental degradation and disturbing the ecology results in impinging upon the protected fundamental rights of the citizen. The state has to, therefore, endure to provide a clean and decent environment and ensure that its wholesomeness is maintained."<sup>82</sup> Similarly in *M/S Sterlite Industries Ltd v Tamil Nadu Pollution Control Board*<sup>83</sup> the Tribunal stated "Article 21 of the Constitution of India ... is interpreted to include in the right to life the right to a clean and decent environment. Right to decent environment also gives by necessary implication, the right against environmental degradation. It is in the form of right to protect the environment, as by protecting environment alone can we provide a decent and clean environment to the citizenry. The most vital necessities, namely air, water and soil having regard to the right to life under Article 21 cannot be permitted to be misused or polluted so as to reduce the quality of life of others. Risk of harm to the environment or to human health is to be decided in public interest. Thus, the right of an individual to a healthy and clean environment including air, water, soil and noise-free environment is of paramount consideration and it is impermissible to cause environmental pollution. Since the different facets of environment are relatable to life and human rights and concerns a person's liberty, it is necessary that the resources are utilised in a planned manner."<sup>84</sup>

This paper argues that the 'recognition of a right' does not necessarily entail its enforceability and execution in practical terms. The latest studies reveal a grim picture for a legally binding right to an environment. The 2014 Yale Environmental Performance Index<sup>85</sup> ranked India 174<sup>th</sup> out of 178 countries on air pollution. According to this report 'more people die of asthma in India than anywhere else in the world. Automobile sales in India have boomed, and diesel is the fuel of choice. Many industries pollute, defying existing environmental laws and regulations. Pollution monitoring is a haphazard affair. The World Bank says that the environmental degradation is costing India 80 billion US Dollars annually and accounts for 23 percent of the nation's child mortality.'

Also, a BBC Report<sup>86</sup> titled 'Is this the city with the loudest car horns?' states that 'noise

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<sup>80</sup> *Goa Foundation v Union of India* Judgment dated July 18, 2013 para 18

<sup>81</sup> Judgment dated February 6 2014

<sup>82</sup> *Ibid* para 12

<sup>83</sup> Judgment dated August 8 2013

<sup>84</sup> *Ibid* para 113

<sup>85</sup> [http://www.nytimes.com/2014/02/14/opinion/indias-air-pollution-emergency.html?\\_r=0](http://www.nytimes.com/2014/02/14/opinion/indias-air-pollution-emergency.html?_r=0) accessed 15.2.2014

<sup>86</sup> <http://www.bbc.co.uk/news/magazine-25944792> accessed 10.2.2014

pollution is so serious in Delhi that it is having a measurable impact on people's health. Seven million cars jostle for space on Delhi's roads. Beside the revving of engines and squealing of brakes, ear drums are hammered by the continuous blast of automobile horns. The noise pollution is not only affecting school children and hospital patients, it is contributing to increased stress and heart diseases and causing the onset of age related deafness 15 years earlier than the normal.'

It appears that the aspirational right to an environment through judicial interpretation may only ascribe a value or status to an entitlement which may or may not be implemented.

### 3.3 The Principle of Sustainable Development

The principle of sustainable development reconciles three pillars: economic development, social equity and environmental protection by adopting a developmental path.<sup>87</sup> This extends from now into the distant future in such a manner that both present and future generations benefit. The fundamental concepts of integration and equity are inter-woven in an explicitly normative principle. The principle represents a formalization of the intuitively attractive idea of a balanced synthesis of environmental and developmental imperatives ensuring social sustainability.

The principle of sustainable development is an essential feature of India's environmental jurisprudence<sup>88</sup>. Section 20 of the NGT Act mandates the application of this principle while deciding environmental disputes. The Tribunal is a fulcrum of sustainable development- 'a development that can take place and which can be sustained by nature/ecology with or without mitigation. In such matters, the required standard is that the risk of harm to the environment or human health is to be decided in public interest according to a 'reasonable person's' test. The development of the industries, irrigation resources and power projects are necessary to improve employment opportunities and generation of revenue; therefore, cannot be ignored. In such an eventuality, a balance has to be struck, for the reason that if the activity is allowed to go, there may be irreparable damage to the environment as well as to the economic interest.'<sup>89</sup>

The above stated principle seeks a balance between the quantity of development and the quality of environment. The Indian experience indicates that the implementation of

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<sup>87</sup> Report of the World Commission on Environment and Development, *Our Common Future* (1987) (The Brundtland Report)

<sup>88</sup> *G Sundarajan v Union of India* Supreme Court of India order dated May 6, 2013; *M. C. Mehta v Union of India* (1992) 3 SCC 256; *Buffalo Traders Welfare Association v Maneka Gandhi* (1996) 11 SCC 35; *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664; *T. N Godavarma Thirumulpad v. Union of India* (2002) 10 SCC 606; *M.C. Mehta v. Union of India* (2004) 6 SCC 588; *M.C. Mehta v. Union of India* (2004) 12 SCC 118

<sup>89</sup> *Shobha Phadanvis v State of Maharashtra* Judgment dated January 13 2014; *Sarang Yadwadkar v The Commissioner* Judgment dated July 11 2013; *Devender Kumar v Union of India* Judgment dated March 14 2013

sustainable development as a justiciable principle has given substance to the principles of proportionality, precaution and inter-generational equity. In *M/S Riverside Resorts Ltd v Pimpri Chinchwad Municipal Corporation*<sup>90</sup> the Tribunal explored the scope of the word 'development.' The issue before the NGT was the application of sustainable development to allow the proposed construction of a crematorium within the prohibited area [river bank] likely to cause serious damage to the environment due to the reduction of the width of the river and enhanced possibility of causing damage to crops, properties or human beings in the area. The Tribunal was of the opinion that the 'place of cremation/incineration is only a public utility service provided for the disposal of dead bodies. By no stretch of imagination can it be defined as a 'developmental activity' or 'sustainable development' within the meaning of environmental laws. The cremation/incineration does not lead to any production or development of anything new or creation of something which may be needed as development activity for the progression of the society.' Thus, the proposed construction was illegal, against the environmental parameters and was stopped.

In *Sarang Yadwadkar v The Commissioner, Pune Municipal Corporation*<sup>91</sup> the Tribunal allowed the construction of a road within the floodplain but subject to stringent conditions. Keeping in mind the peculiar facts of the case, the Tribunal ordered the construction of the road on elevated pillars in the area of the floodplain, irrespective of the additional costs, as it would neither obstruct the flow of the river nor narrow the floodplain. The scientific expert evidence supports the argument that encroachment of floodplains, even a small portion, impairs the hydrological functions including groundwater recharge, biological productivity, sediment trapping and stabilization, habitat for flora and fauna and nutrient storage of the floodplain ecosystem, thereby, creating problems for the present and future generations.

This paper argues that the principle of sustainable development inserts an accountability focused approach whereby the authorities cannot be permitted to cause irreversible damage to the environment in the name of developmental activities undertaken in the greater public interest. In delivering its judgment, the Tribunal struck a balance between protecting the environment and the greater public interest of protecting people's lives against the threat of flooding and disaster by allowing an elevated road building that did not damage the floodplain.

In *B B Nalwade v Ministry of Environment and Forests*<sup>92</sup>, the NGT upheld the grant of environmental clearance for a coal based thermal plant on the ground that the project operated within an eco-legal framework and contributed significantly to sustainable industrial development. All the necessary scientific studies and statistical information were

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<sup>90</sup> Judgment dated January 29 2014

<sup>91</sup> Judgment dated July 11 2013

<sup>92</sup> Judgment dated November 29 2011

taken into account regarding the viability of the project and its impact on the environment.

These judgments reflect that the discourse of sustainable development pragmatically embraces development for the maximisation of human welfare over the long run but not by compromising the ecological impact and more so when resources are non-renewable or where the end result would be irreversible.

### 3.4 The Precautionary Principle

The precautionary principle has been affirmed as a legal principle providing action to avert risks of serious or irreversible harm to the environment or human health in the absence of scientific certainty about that harm.<sup>93</sup> The precautionary principle rallies interested actors with diverse interests and expertise, namely, scientists, legal and policy makers, environmentalists, economists, ethicists, public authorities and others. The interaction among these interested actors often produces vague, ambiguous or unwanted results, thereby, prompting the re-examination of the issues or debates. This churning possibly 'fosters a mutual understanding to accommodate differences in the production of knowledge and the reaching of judgments.'<sup>94</sup>

The precautionary principle is viewed as a fundamental tool to achieve sustainable development and plays an important role in the reasoning of international and national courts. The Supreme Court of India has recognised the principle as an essential feature of sustainable development. In the municipal context, the principle envisages three conditions:

1. The state government and statutory authorities must anticipate, prevent and attack the causes of environmental degradation;
2. Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
3. The 'onus of proof' is on the actor or the developer/industrialist to show that his actions are environmentally benign.<sup>95</sup>

The NGT provides a forum to interpret and apply the principle of precaution as mandated under section 20 of the NGT Act. Bolstering the rulings of the Supreme Court<sup>96</sup>, the Tribunal

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<sup>93</sup> Rosie Cooney, 'The Precautionary Principle in Biodiversity Conservation and Natural Resource Management: An issues paper for policy-makers, researchers and practitioners' IUCN (2004) 1

<sup>94</sup> Jaye Ellis, 'Perspective on discourses in international environmental law: expert knowledge and challenges to deliberative democracy' in Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge University Press 2012) 128

<sup>95</sup> *Vellore Citizen's Welfare Forum v Union of India* (1995) 5 SCC 647 at 658; *Karnataka Industrial Area Development Board v C. Kenchappa* (2006) 6 SCC 371 at 384

<sup>96</sup> *Vellore Citizens' Welfare Forum v. Union of India* AIR 1996 SC 2715; *M. C. Mehta v Union of India* (2004) 12 SCC 118; *Research Foundation for Science v Union of India* (2005) 13 SCC 186

has declared the precautionary principle as an integral part of national environmental law. According to the Tribunal, 'the applicability of precautionary principle is a statutory command to the Tribunal while deciding or settling disputes arising out of the substantial questions relating to environment. Thus, any violation or even an apprehended violation of this principle would be actionable by any person before the Tribunal. Inaction in the facts and circumstances of a given case could itself be a violation of the precautionary principle, and therefore, bring it within the ambit of jurisdiction of the Tribunal, as defined under the NGT Act.'<sup>97</sup>

In *T Murugandam v Ministry of Environment and Forests*<sup>98</sup>, the NGT applied the precautionary principle and directed the project proponent, M/S IL and FS Tamil Nadu Power Company to carry out cumulative impact assessment studies with regard to the proposed coal based power plant. Cumulative impact assessments were required by the Tribunal in order to identify adequate mitigating measures and environmental safeguards to avoid adverse impacts on the ecologically fragile eco-system of mangroves and to the biological marine environment in the vicinity of the proposed plant.

In *Gram Panchayat Totu [Majthai] v State of Himachal Pradesh*<sup>99</sup>, the NGT entertained an application wherein the project proponent, Municipal Council, Shimla failed to obtain mandatory environmental clearance from the authorities concerning the proposed construction of the municipal solid waste [MSW] plant in close proximity to human habitation. The Tribunal observed that the precautionary principle requires and mandates the necessary preventive and control measures needed to be implemented before commissioning the MSW plant. These included obtaining environmental clearances under the environmental impact assessment rules and statutory siting permissions for locating MSW facilities. The preventive measures aimed to avoid any adverse impact on the environment especially on the ground water and surface water bodies, keeping in mind the right to enjoy pollution free air and water under the right to life.

In a more recent case, *Durga Dutt v State of Himachal Pradesh*<sup>100</sup>, the Tribunal stated that the 'precautionary principle acts an environmental safeguard to achieve sustainable development. The principle essentially has the element of prevention and prohibition.' The facts of the case relate to environmental degradation and damage to the glacier of the Rohtang Pass Valley, known as the 'Crown Jewel of Tourism of India.' Unregulated and heavy tourism, overcrowding, misuse of natural resources, construction of buildings and infrastructure, littering of waste, deforestation and global warming have resulted in environmental problems in this eco-sensitive area. The Tribunal decided that there was an

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<sup>97</sup> *Goa Foundation v Union of India* Judgment dated July 18 2013

<sup>98</sup> Judgment dated May 23 2012

<sup>99</sup> Judgment dated October 11 2011

<sup>100</sup> Judgment dated February 6 2014

imperative need to restore the degraded environment of the glacier and prevent further damage by adopting proper precautionary measures. The measures include regulated and restricted vehicular traffic, introduction of stringent vehicular emission norms, use of clear natural gas and alternative enviro-friendly fuels, prohibition of carrying and use of plastic bags and littering of any kind, no commercial activity at the glacier. Interestingly, this is the first Indian case to recognize global warming as an environmental threat involving the specific impact on the glacier resulting in the early and untimely melting of ice.

This paper argues that the interpretation and application of the precautionary principle at the municipal level in India reinforces and gives primacy to the most developed form of prevention which remains the general basis for environmental protection measures. The Tribunal has applied the precautionary principle on the presumption of an activity having a potentially negative effect on the environment or posing danger to human health. Surprisingly, the distinction between scientific uncertainty on the one hand and the likelihood of harm based on scientific information on the other may be conflated. *Sarang Yadwadkar v The Commissioner*<sup>101</sup> supports this contention, wherein it was stated 'the precautionary principle can be explained to say that it contemplates that an activity which poses danger and threat to environment is to be prevented. Prevention is better than cure. It means that the state governments and local authorities are supposed to anticipate and then prevent the causes of environmental degradation. The likelihood of danger has to be based upon scientific information, data available and analysis of risks. Ecological impact should be given paramount consideration and it is more so when resources are non-renewable or where the end results would be irreversible. The principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. Again it is based on scientific uncertainty.'<sup>102</sup> These rulings appear to create uncertainty regarding the scope and application of the principle of precaution through the conflation of precaution and prevention. Nevertheless, this principle mandates well-judged usage in favour of observing, preventing and mitigating an undetermined potential threat.

### 3.5 The Polluter Pays Principle

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<sup>101</sup> See, above n. 91

<sup>102</sup> Ibid para 30. Additionally, see the case, *M/S Sterlite Industries (India) Ltd v Tamil Nadu Pollution Control Board*, Judgment dated August 8, 2013 wherein the Tribunal stated 'Precautionary principle is one of the most important concepts of sustainable development. This principle essentially has the element of prevention as well as prohibition. In order to protect the environment, it may become necessary to take some preventive measures as well as to prohibit certain activities. These decisions should be based on best possible scientific information and analysis of risks. Precautionary measures may still have to be taken where there is uncertainty but potential risk exists.'

The polluter pays principle supplies the means through which the cost of pollution prevention, control and reduction measures are borne by the polluter. The overarching principle is recognized as an integral component of sustainable development. Kiss and Shelton<sup>103</sup> suggest that the application of the principle is easy and effective in a geographic region subject to uniform environmental law, such as within a nation state.

In Indian environmental jurisprudence, the polluter pays principle includes environmental costs as well as direct costs to people or property. The Supreme Court of India has fleshed out the ratio by stating that the 'remediation of the damaged environment is a part of the process of sustainable development and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.'<sup>104</sup>

The NGT has strengthened Supreme Court rulings. In *Hindustan CocaCola Beverages Pvt Ltd. v West Bengal Pollution Control Board*<sup>105</sup> the Tribunal stated 'it is no more *res-integra*, with regard to the legal proposition that a polluter is bound to pay and eradicate the damage caused by him and restore the environment. He is also responsible to pay for the damages caused due to the pollution caused by him.'<sup>106</sup> Additionally, whilst developing the discourse on environmental justice, the NGT has made significant progress by using the principle to shift the cost onto the polluter for the administration of the pollution control system and the consequences of the pollution. For example, it includes compensation and clean up so that a necessary environmental quality objective is achieved. In the *Rohtang Pass Glacier* case<sup>107</sup> the Tribunal was of the opinion that in order to strengthen the polluter pays principle and in the interest of sustainable development, the tourists and vehicles<sup>108</sup> using the Rohtang Pass road for their enjoyment, pleasure or commercial benefit must be made to pay. The Tribunal directed that all persons travelling by public or private vehicles must pay a reasonable sum as a contribution towards polluter pays principle in the Green Tax Fund created by the state government. The amount in this fund is to be used only for the prevention and control of pollution, restoring the vegetative cover and afforestation and for no other purpose.

In *Manoj Mishra v Union of India*<sup>109</sup>, the Tribunal passed an order for the application of polluter pays on the backdrop of a petition filed by Manoj Mishra, a leading environmental activist, who opposed the dumping of debris and construction waste on the banks of the river Yamuna. Yamuna is the lifeline of Delhi, India's capital, providing a constant supply of

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<sup>103</sup> See Kiss and Shelton, above n.4 at 119

<sup>104</sup> *Indian Council for Enviro-Legal Action v Union of India* (1996) 3 SCC 212; *Karnataka Industrial Area Development Board v C Kenchappa* (2006) 6 SCC 371; *M. C. Mehta v Union of India* (2006) 3 SCC 399

<sup>105</sup> Judgment dated March 19 2012

<sup>106</sup> *Ibid* para 17

<sup>107</sup> See, above n.100

<sup>108</sup> As per the figures available, nearly 10,000 people visit the tourist spot per day in the months of May and June and 87.3 percent of total vehicles plying on Rohtang Pass belong to tourists

<sup>109</sup> Judgment dated July 22 2013

water.<sup>110</sup> Any person found dumping debris on the river bank at any site was liable to pay a sum of Rupees 5 Lakhs [£5,000] for causing pollution. The recovery of the fine was from the person responsible for dumping the debris as well as the person to whom the debris belonged.

The consequence of the NGT order witnessed government agencies [one of the major parties dumping debris] removing thousands of truckloads of constructional and demolition waste from the banks of the river Yamuna. However, there was no plan regarding an alternative waste site! The record shows that Delhi generates 5,000 tonnes of debris daily but only has a single debris processing plant which handles 500 tonnes of debris a day. Evidence is available to show that governmental authorities such as Delhi Metro Road Corporation have dumped 50,400 tonnes of debris in the riverbed, equivalent to around 8,000-9,000 truckloads.<sup>111</sup>

This paper argues that the continuous infringement of law and failure on the part of state authorities to prevent environmental degradation renders legal provisions nugatory and encourages unlawful activities. Behaviour such as callous and indifferent attitudes exhibited by the authorities, corruption and ineptitude pose immense threats to the environment and the public at large. Given the scale of environmental violations in India, polluters should not only be made to compensate for immediate damage but it should act as a deterrent. The principle of polluter pays should be combined with stringent regulatory measures to achieve the desired results.

### 3.6 The Principle of Participation

Schlosberg's<sup>112</sup> work argues that a broad understanding of environmental justice involves participation in environmental controversies. The access rights- information, participation in decision –making and justice- are the core elements of the principle of participation. The scope of this section, however, is confined to access to justice in relation to legal standing in the NGT.

The concept of litigant 'standing' in environmental matters has been broad and liberal, facilitated by public interest litigation [PIL]. The traditional standing was modified in two ways, namely through representative and citizen standing. The proactive Supreme Court of

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<sup>110</sup> Gitanjali Nain Gill, 'Environmental Protection and Development Interests: A Case Study of the River Yamuna and the Commonwealth Games, Delhi 2010' 6 1/2 *The International Journal of Law in Built Environment [Special Issue on Environmental Law]* (2014) 69-90 at 70-71

<sup>111</sup> <http://www.hindustantimes.com/india-news/newdelhi/metro-chokes-yamuna-with-debris/article1-1065100.aspx> accessed 15.2.2014

<sup>112</sup> See Schlosberg, above n 8. According to Schlosberg, participatory mechanisms can help meliorate issues of inequality, recognition, and the larger question of capabilities and functioning of individuals and communities



India acting as ‘amicus environment’ locked together human rights and environment to develop *sui generis* environmental discourse entertaining PIL petitions, seeking remedies, including guidelines and directions in the absence of legislation.<sup>113</sup> With the implementation of the NGT Act, ‘standing’ has been reformulated in terms of ‘an aggrieved person’ who has the right to approach the Tribunal under its original or appellate jurisdiction.

The NGT in *Jan Chetna v Ministry of Environment and Forests*<sup>114</sup> explained the scope and ambit of the term ‘aggrieved person.’ The judge stated ‘the expression aggrieved person cannot be considered in a restricted manner. A liberal construction and flexible interpretation should be adopted. In environmental matters the damage is not necessarily confined to the local area where the industry is established. The effects of environmental degradation might have far reaching consequences going beyond the local areas. Therefore, an aggrieved person need not be a resident of the local area. Any person whether he is a resident of that particular area or not, whether aggrieved or not, can approach this tribunal. In such a situation, it is necessary to review the credentials of the applicants/appellants as to their true intention or motives.’<sup>115</sup> As a result of a challenge by Jan Chetna an NGO concerning the grant of environmental clearance for the installation of a steel and power plant the NGT ruled that the NGO was an aggrieved party and that their claim for a proper public hearing was sustainable.

The liberal approach of the Tribunal is evidenced in the cases of *Vimal Bhai v Ministry of Environment and Forests*<sup>116</sup> and *Goa Foundation v Union of India*<sup>117</sup>. Two reasons explain this approach: first, is the inability of persons living in the area or vicinity of the proposed project to understand the intrinsic scientific details coupled with the effects of the ultimate project and any disaster it may cause. Thus there is a right of any citizen to approach the tribunal regardless of whether he is directly affected by a developmental project or whether a resident of affected area or not. Second, the subservience of statutory provisions of NGT Act to the constitutional mandate of Article 51A (g) establishes a fundamental duty of every citizen to protect and improve the natural environment.

A recent judgment that further expands the already liberal definition of an “aggrieved person” is the case of *Betty C Alvares v State of Goa*.<sup>118</sup> The word ‘person’ was construed to include ‘an individual’, whether a national or a person who is not a citizen of India. The proceeding relating to an environment dispute raised by Betty Alvares who is not an Indian citizen was held to be maintainable. The Tribunal held that it is not necessary to see whether she has personally suffered any loss on account of damage caused to environment

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<sup>113</sup> See Gill, above n 15 at 203-206

<sup>114</sup> Judgment dated February 9 2012

<sup>115</sup> Ibid paras 21 and 22

<sup>116</sup> Judgment dated December 14 2011

<sup>117</sup> Judgment dated July 18 2013

<sup>118</sup> Judgment dated February 14 2014

by acts of illegal construction and encroachment of the sea beaches thereby violating coastal zone regulations. It was not necessary to see whether she has suffered any injury. It was sufficient to see whether there was a substantial question relating to environment and such question arose out of the implementation of enactments specified in Schedule-1, appended to the National Green Tribunal Act, 2010.<sup>119</sup> Therefore, the application was not dismissed for the reason that Betty Alvares had no *locus standi*, inasmuch as she fell within the definition of word 'person' as defined in Section 2 (1) (j) NGT Act, 2010.<sup>120</sup> Thus, the court appears to have opened its doors globally to each and every person, including incorporated bodies, that considers themselves "aggrieved" within the political boundaries of India subject to the enactments specified within Schedule-1, NGT Act, 2010.

In contrast, the Tribunal has discouraged the practice of fuelling the litigation where some persons with vested interests indulge in the past time of meddling with the judicial process either by force of habit or from improper motives. Litigious petitioners will not be entertained by the Tribunal as an "aggrieved party" and costs will be imposed to deter such people from filing frivolous applications.<sup>121</sup>

Thus, the discourse on participation helps establish those strong foundations of access to justice that promote just and equitable outcomes.

## CONCLUSION

As with other nation states that are signatories to the various international treaties and conventions on environmental law India accepts and honours these legal commitments through judicial practice. However, India is also different in that it specifically accepts these international environmental law principles and obligations to work alongside the expansively interpreted constitutional right to life as stated in Article 21. The establishment of the NGT has produced a forum for greater plurality of environmental justice; one that applies the principles of international environmental law through an enhanced access to justice route for those who seek economic development and those who seek to protect the environment. The powerful symbiotic linkage between human rights and environmental protection discourse has resulted in environmental decisions that have broadened participatory standing, greater government accountability, larger public interest, and

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<sup>119</sup> See above, n. 37

<sup>120</sup> Section 2(1) states "In this Act, unless the context otherwise requires,—  
(J) person" includes—

(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, (vii) A local authority, and (viii) Every artificial juridical person, not falling within any of the preceding sub-clauses."

<sup>121</sup> *Rana Sengupta v Union of India* Judgment dated March 22, 2013; *Bajinath Prajapathi v Ministry of Environment and Forests* Judgment dated January 20 2012

addressed economic growth and associated environmental protection. The process of regulatory enforcement is relatively weak in India and has resulted in greater emphasis being placed upon environmental protection via the discourse of the principles of international environmental law and domestic human rights. Within this context the caretaker and social policy role of the NGT has both enhanced status and popular expectation.