Proceedings of State Level Consultation on National Green Tribunal Bill 2009
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Organised by: Vasundhara, Bhubaneswar & TAI India NewDelhi

Background of the Bill: The National Green Tribunal Bill, 2009 was introduced in the Lok Sabha by Environment Minister Jairam Ramesh on July 31, 2009 after it got the approval from the cabinet. The ministry had submitted a note before the cabinet on July 17, 2009 proposing establishment of the tribunal. The decision of the Ministry of Environment and Forests to set up a National Green Tribunal is considered one of the long awaited requirements to deal with the flurry of environmental litigations across the country. Pursuant to the observations of the Supreme Court of India in four landmark judgments, namely, M.C. Mehta vs. Union of India, 1986 (2) SCC 176; Indian Council for Environmental-Legal Action Vs Union of India: 1996(3) SCC 212; A.P. Pollution Control Board Vs M.V. Nayudu: 1999(2) SCC 718 and A.P. Pollution Control Board Vs M.V. Nayudu II: 2001(2) SCC62, the Law Commission in its 186th Report had recommended to set up "multi-faceted" Environmental Court in each state of India with judicial and technical/scientific experts as they exist in Australia, New Zealand and other countries. Having regard to the complex issues of fact of science and technology which arise in environmental litigation and in particular, in the elimination of pollution in air and water, it is now recognized in several countries that the Courts must not only consist of Judicial Members but must also have a statutory panel of members comprising Technical or Scientific experts. The increasing number of environmental litigations in India and the acceptance of the fact by the Supreme Court in various cases that it does not have requisite expertise knowledge to deal with complex environmental issues and its continuous emphasis to set up an environmental court has compelled the government to propose such a kind of bill.

Basic Features of the Bill:

A draft of the bill has been around since the year 2006. The bill comes in response to the 186th report of the Law Commission of India on the Proposal to Constitute Environmental Courts in September 2003 had noted, "the National Environmental Appellate Authority constituted under the National Environmental Appellate Authority Act, 1997, for the limited purpose of providing

a forum to review the administrative decisions on Environment Impact Assessment, had very little work. It appears that since the year 2000, no judicial member has been appointed. So far as the National Environmental Tribunal Act, 1995 is concerned, the legislation has yet to be notified despite the expiry of eight years. Since it was enacted by Parliament, the tribunal under the act is yet to be constituted. Thus, these two tribunals are non-functional and remain only on paper." The bill would replace above mentioned environmental authorities.

Most importantly, unlike the Environment Tribunal Act of 1995, the proposed ‘‘Environment Tribunal Bill’’ seeks to provide the new courts the power to adjudicate on the disputes. Previously, approved tribunals only had jurisdiction to award compensation and relief for damage to persons, property and the environment. The tribunals would adjudicate disputes relating to all civil cases where a substantive question of environmental protection including enforcement of legal rights relating to environment is involved. It means the new courts will have the power to declare illegal and invalid any administrative actions and private party’s claim if it militates against the provisions of the existence environmental laws. Significantly, the new courts can review orders passed under the environment protection laws covering all environmental subjects such as water, air, forest and protection of wildlife. Again, no other court or authority will have the jurisdiction to entertain any application, claim or action that can be dealt with by the tribunals. This will make various government departments more cautious and put them under close scrutiny in giving license to industries and clearing projects indiscriminately. This power of new courts can make them the strongest environmental court in comparison to all other environmental courts in different parts of the world.

The proposed bill also appears sound and strong when it says that any non-compliance with any directions or order of the tribunal would be an offence punishable with fine which may extend up to rupees of ten crore. It also emphasizes that if non-compliance continues; the courts can take away the offender’s property and direct its sale for proceeds after three months have elapsed. The new courts’ power to deal with polluters for non-compliance will strengthen the implementation process which in the present system looks very bleak.

Welcome Address: Prasanta Mohanty, Executive Director of Vasundhara has given the Keynote speech of the State level consultation on National Green Tribunal bill 2009.He has presented about the role of Vasundhara in facilitating environmental justice in Orissa and India. Also he has highlighted the Role of Vasundhara in Environmental Governance, Policy and law making process. Then after he invited all the dignitaries like Justice N.Venkatchalla, Former Judge, Supreme court of India, Justice Choudhury Pratap K Mishra, Former Judge, Orissa High court, Professor Faizan Mustafa, Vice Chancellor, National Law University Orissa and Ritwick Dutta , Advocate , Supreme court of India to the dais for inaugural session of the meeting.

Sankar Prasad Pani made a presentation on the Journey of the Present Green tribunal Bill from

Green Bench Via NETA,NEAA, CEC and 186th Law commission report for constitution of environmental court.

Opinions of the Participants and Speakers:

Justice N.Venkatchalla, Former Chairman NEAA and Judge Supreme court of India told that there is nothing Green in the bill and termed it as a "Blackbill". The major contentions that he raised are "***Substantial question relating to Environment***" is a vague term and needs more specification. ***Hazardous Substance exceeding such quantity***, as defined in EP Act will give a good defense for the polluter and the onus will be on the victim to proof that it exceeds such quantity. The term environment is an inclusive one and needs specification. Environment as defined is a broad term to be accommodated in Green Tribunal and looking at the composition and sitting of the Tribunal; the number of cases will be huge to be dealt by the Tribunal. So for a practicable functioning of Tribunal, there should be a clear definition of the terms used in the bill. Also there are some sections need to be completely deleted like Section 35 on amendment of certain enactments is superfluous as this legislation has the overriding effect. Section 21regarding the order of the tribunal is final is also redundant and ridiculous as how a statute can take away the writ jurisdiction of High courts and Supreme courts. Section 14 of the Bill also needs to be deleted completely as it is making the provisions and objective of the bill more complex. There is also no appeal provision which will drag all the cases again to High courts and then to Supreme courts. He has suggested for creating a Green Bench in all High courts to deal with such cases in place of setting a Tribunal. If the tribunal comes then it should have a Registrar as that of a High court. There should be least interference of government in the administration of the Tribunal and the Chairperson of the Tribunal should be given all the benefits as that of a Supreme Court judge.

Justice Choudhury Pratap K Mishra, Former Judge, Orissa High court: He has emphasized on need of a special judicial body to adjudicate the environmental issues at length as the environmental pollution and concerns are increasing day by day. It is also important as the regulatory authorities have failed to protect the environment and improve the environmental hygiene. In this context the green tribunal composition and constitution should be so that it can work independently and can be free from govt. influence.

Professor Faizan Mustafa, Vice Chancellor, National Law University Orissa:

The significant factor, contributing to the 'practical necessity' argument, is the fragmented nature of remedies under the current dispensation which provides for multiple appeal routes under different statutes. The proposed Environmental Courts would act as 'one stop shop' or single window for all environmental adjudication.

Lacunae in the National Green Tribunal (NGT) Bill

1. It limits the jurisdiction to ***"substantial questions relating to environment"*** which only includes instances where the ***community at large is affected*** or likely to be affected—but excludes individuals or groups of individuals. It is, therefore, unclear whether this law only seeks to promote class actions. If this is the case, such a structure would be undesirable. Environmental impact and conflict need not be only limited to the "*community at large*" but may also affect groups of individuals and individuals—who deserve as much protection—in equal measure as the "*community at large*", which itself is not defined. This portion of the Bill should simply be deleted, before it heads inevitably towards a Constitutional challenge in the Supreme Court. Moreover, since the courts have recognized that the environment falls within the purview of Article 21, it is clear that all persons have a duty to protect the environment and a corresponding right to question the adverse impact on environment and human health. But the Bill ignores this principle.

2. Only those pieces of legislation under the ministry of environment and forests are the subject matter of the Bill. Two more key laws, the recently enacted Forest Rights Act and tribal self rule law, which are giving rise to numerous conflicts, have been ignored.

3. The Bill also limits the application for adjudication of a dispute to six months from the date of cause of action. Considering our country's complexity, this would be unfair—to say the least—for a large number of rural poor can be prevented from approaching such a tribunal on mere technicality.

4. The Bill's provisions for relief, compensation and restitution aren't great. While the concept of restitution is a positive one, where it is not only the complainant's loss that is calculated but the violator's gain that is considered, it is equally important to add the concept of restorative justice in environmental violations. It is the restoration of the original ecological status that is the biggest challenge.

5. There is an implicit threat to petitioners **- Section** 22(2) of the Bill reads: "Where the Tribunal holds that that a claim is not maintainable, or false or vexatious, the .... Tribunal may ...make an order to award costs, including lost benefits due to any interim injunction." This provision is quite discouraging. This will deter concerned citizens from bringing environmental issues before the Tribunal, fearing the imposition of heavy costs in case their claim is disallowed. "There is much that needs to be revised in the draft before the law is enacted. Whether the Environment Ministry now takes up such reform will be watched keenly".

6. The Bill seems to confine itself to relatively non-serious offences for it envisages that "Notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence under this Act shall be deemed to be non-cognizable within the meaning of the said Code." This is insufficient to deal with serious cases of violation such as Bhopal Gas Leak. Grave offences of this nature must be made cognizable on a complaint. In the light

of the above, the Bill merits immediate attention of environmental as well worker groups which it has not received so far.

B.P Patajoshi, Law Officer, and OSPCB: The procedural lacunae for speedy disposal of environment cases can be solved if the National Green Tribunal Act is enacted by the Parliament. But it is found from the proposed Act that there is provision for filing appeal directly against the order passed under Section 33A of the Water (PCP) Act, 1974 and Section 5 of the Environment (Protection) Act, 1986 without any appeal to the Appellate Authority constituted under Section 28 of the Water (PCP) Act, 1974, Section 31 of the Air (PCP) Act, 1981 and Rule 13 of the Bio-Medical Wastes (M&H) Rules, 1998. It is pertinent to mention here that Section 33A of the Water Act is not an independent section as the said power can be exercised subject to other provision of the Act, which is appealable before the Appellate Authority constituted under Section 28 of the Water Act, 1974. That apart, there should also be provision of filing appeal against any order of the Board under Section 31 & 32 of the Water Act, 1974.

Hence, it is suggested that Section 28 of the Water (PCP) Act, 1974 shall be amended suitably in the line of Section 31 of the Air Act so that any order passed by the Board under Water Act should also be appealable before the Appellate Authority. That apart, there should be provision for filing appeal against any order passed under Environment (Protection) Act, 1986 or Rules framed there under before the authority constituted under Rule 13 of the Biomedical Wastes (M&H) Rules, 1998 or before the Appellate Authority constituted under Section 28 of the Water Act and 31 of the Air Act.

Appeal against section5 of Environment Protection Act is also there in Biomedical Waste Management Handling Rules 1998 and again appeal to NGT will create confusion. Hence those rules under E.P. Act have already appeal provisions should not have again appeal in NGT.

Ritwick Dutta, TAI India: He is of opinion that all care should be taken in NGT Bill so that the lacunas and short comes in NEAA will not be repeated. Secondly the Retired administrative persons should not be appointed as expert member in NGT. There is a serious need of redrafting the bill since in its present form will neither serve justice for environment nor an effective remedy for affected people. Also he has apprehension that the present form of Green tribunal bill is to kill the Forest Advisory committee and Centrally Empowered Committee that rejects 34%of total forest clearance cases. The tribunal has diminished its power to revoke environmental clearance. Also the Bill does not It does not have the provision to stop environmental damages before it occurs

The Appointment of experts as proposed in the bill is controversial: As it stands, the expert members of the Tribunal would need "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". This is undisguised program that

nearly all retired senior bureaucrats join. All earlier attempts in handling the environmental problems through the NEAA and other bodies have failed because their control was left in the hands of bureaucrats. Had such appointees been competent, those government departments or institutions where they served would have surely been instrumental in protecting the environment, which is clearly not the case and which had led to the necessity of the Tribunal. In fact it is the colossal failure of administrators that has created the compelling logic for the Tribunal itself."It would be infinitely better for the Tribunal's expert members to be of technical and scientific background". What would be infinitely better is for the Tribunal's expert members to be of technical and scientific background, experts in public health, occupational health, social science with relevant experience in environmental and occupational health, etc. with a minimum experience of 15 years.

Professor Armin Rosencranz, Stanford University and Geetanjoy Sahu, Assistant Professor Tata Institute of Social Sciences (TISS), Mumbai:

The bill deals with the eligibility or *locus standi* of the claimant (aggrieved person) to file an application before the tribunal and envisages that "any representative body or organisation functioning in the field of environment, with permission of the tribunal" can file an application for grant of relief or compensation or settlement of dispute to the tribunal. This “field of environment” qualification could be problematic. The right of an individual or a body of individuals to bring a claim should be recognized by the Tribunal, irrespective of the field they are working or living in. These could include individuals or, groups working in the field of public health, human rights, workers’ rights, resident welfare associations and others. The bill should define the appropriate claimants. Cost is dealt with in clause 22 of the bill which empowers the Tribunal to make an order for costs as it may consider necessary. The recovery of costs is important for environmental litigation to be viable. Courts should be willing to award costs of litigation against a losing party. Most US environmental laws contain “citizen suits” provisions where courts are empowered to award the costs of litigation to environmental claimants. These citizen suits provisions, together with the contingency fee system, where law firms pay for litigation on the understanding that they will recover their costs plus one-third of the damage award if they win, has vastly increased the number of cases that are brought to court in the US.. Obtaining a *discretionary* order of the Tribunal on behalf of a claimant taking an environment case can be a disincentive to take action. The bill makes a distinction between workmen and other persons for the claiming of compensation for injury or death arising out of a violation of an environmental statute. Under current procedure, workers can claim compensation under the Workers Compensation Act 1923, which is a slow and cumbersome process. Under the Green Tribunals Bill, a worker must still bring a claim for injury or death under the Workers Compensation Act, while the worker’s family might be entitled to make a claim to the Green Tribunal. If the Tribunal is to be an expert Tribunal then it should consider all claims relating to the environment (section 17). Again, there is reference to "workman" as defined in the Workmen Compensation Act; it is unclear whether the definition is comprehensive enough to include

casual workers and contract workers besides regular workers. The Tribunal will only entertain disputes which are made within six months from the date on which the cause of action first arose. Where there is sufficient cause, the Tribunal will allow a further sixty days. But a cause of action may pre-date the consequence by more than six months. For instance, a water-body may become polluted during the monsoon following the illegal dumping of mining waste near it. Ostensibly, the cause of action was the illegal dumping of mining waste which is not a strict water pollution issue. In such a situation, the affected people are out of time. Also, as we know, people generally delay and sensibly try and get public authorities to do their job before litigating. We would suggest that the Tribunal should have the discretion to extend time without limitation in the interests of justice (section 14).In relation to compensation for victims of pollution, the Tribunal bill stipulates a five year limitation period from when the cause of such claim for compensation first arose, with a further extension where the applicant was prevented by sufficient cause from filing the application. This is a remarkable provision. The statute of limitations begins tolling in personal injury cases from the date of knowledge of an injury caused by the alleged wrong. In asbestosis cases, the incubation period is around 15 years before the damage caused by the long-term effects of inhaling asbestos become manifest. In a recent case of cancer caused by the over-use of pesticides, the incubation period was 10 years. The clause should be changed to "or date of first knowledge," with a proviso to extend time in the interests of justice. Even as the bill refers often to public health concerns, it neither defines public health nor specifically includes as Tribunal members any professionals familiar with environmental health or occupational safety.

Finally, the Green Tribunal will consist of a Chairperson/judge, other judicial members, and a number of experts from different backgrounds. Since the executive will select the tribunal members, how will the executive be prevented from choosing only pro-government members? The expert members, especially, should be nominated by environmental groups, jurists and academics. The selection process should be open to public scrutiny. Once selected, the expert members must impartially determine the costs and benefits of every project that comes before the Tribunal. If this happens, and the Green Tribunal is empowered to take independent decisions, its role will be effective for India's long term environmental improvement.

Open Discussion:

Bibhudendra Pratap Das, Ex-MLA: That it is a long standing demand before Orissa Government to Constitute Green bench in Orissa High court to adjudicate the Environmental cases in the line of Supreme Court order for constituting the Green Bench in every high court. Deliberately the state government has avoided for constitution taking the plea that the SDJM courts in districts have been vested with special power to adjudicate such issues so no need of any green Bench. In this light this National Green Tribunal bill should have provision for constituting in every state.

Dr. D.K Behera Senior Scientist, Orissa State Pollution Control Board: The bill appears to be general and required to be more focused taking in to account Indian socio economic condition. The environmental conflicts are many both in magnitude as well as significance. Green Tribunal is required to be set up at state and district level. A clear cut mechanism with time bound disposal procedure is required to be formulated to minimize the subjectivity and focused on environmental dispute.

Prafulla Samantara: He has raised serious questions about the present system of environment regulation and unless there is a judicial activism it is difficult to check the environment pollution

Bibhu Prasad Tripathy, Advocate, Orissa Highcourt and **Dr.P.K Sarkar**, PG Department of Law, Utkal University has coordinated the Post lunch session.

At the end **Mr.Pradeep Mishra**, Assistant Director, Vasundhara has given vote of thanks.