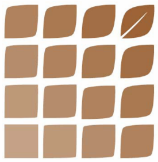

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POLLUTER PAYS PRINCIPLE IN INDIA

ASSESSING CONCEPTUAL BOUNDARIES AND IMPLEMENTATION ISSUES

Harshita Singhal and Sujith Koonan

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POLLUTER PAYS PRINCIPLE IN INDIA: ASSESSING CONCEPTUAL BOUNDARIES AND IMPLEMENTATION ISSUES

[*]Harshita Singhal & [**]Sujith Koonan

ABSTRACT

Polluter Pays Principle ("PPP") is a widely-applied principle in environmental adjudication in India. At the same time, its conceptual boundaries and the challenges involved in its implementation have received little scholarly attention in the Indian context. This paper seeks to address, at least to some extent, this gap or inadequacy of knowledge through an analysis of judgments of the National Green Tribunal ("NGT"). This paper focuses on three aspects of PPP as emerging from NGT cases. First, it looks at the ways in which the meaning of the terms 'pollution' and 'polluter' evolved over a period of time through different cases. Second, it examines the methods of calculation of compensation adopted by NGT. Third, the paper analyses the rationale for applying PPP as explained by the NGT in different cases. Overall, the paper highlights inconsistencies and ambiguities in the understanding and application of PPP in India.

I. INTRODUCTION

Polluter pays principle (**"PPP"**) is a well-recognized principle of environmental law both at the international level[1] and domestic level in India.[2] At the international level, there are several multi-lateral environmental treaties that have incorporated PPP.[3] At the domestic level, PPP is part of environmental law in India at least since the Supreme Court of India (**"SC"**) declared it to be so in the mid-1990s.[4] Off late, PPP has been made an explicit part of an environment-related statute through the

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[1] P. Sands & J. Peel, with A. Fabra & R. MacKenzie, *Principles of International Environmental Law* 228 (3rd ed., 2012); N. D. Sadeleer, *Environmental Principles: From Political Slogan to Legal Rules* (2010).
[2] L. Bhullar, *Polluter Pays Principle: Scope and limits of Judicial Decisions*, 152 in *Indian Environmental Law: Key Concepts and Principles* (Shibani Ghosh, 1st ed., 2019).
[3] N. D. Sadeleer, *Environmental Principles: From Political Slogan to Legal Rules* 23-24 (2010).
[4] See Indian Council for Enviro-Legal Action v. Union of India, (1996) 3 SCC 2012; Vellore Citizens Welfare Forum v. Union of India, AIR 1996 SC 2715.

adoption of the National Green Tribunal Act, 2010.[5] Like many other core principles of environmental law, the conceptual boundaries and implementation conundrums related to PPP were to be evolved through its application to different contexts and facts, which in fact occurred in a complex way. In other words, as Prof. Sadeleer has pointed out, 'the two terms that the principle juxtaposes, "polluter" and "pays" 'appear self-evident at the first glance but become more elusive as one attempts to define them'.[6]

In this context, this paper examines the way PPP has been understood, elaborated and applied in India in the light of cases decided by the National Green Tribunal (**"NGT"**).[7] It relies on judgments on PPP by all the benches of the NGT—Principal Bench (New Delhi), Regional Benches in West (Pune), Central (Bhopal), South (Chennai) and East (Kolkata). The time period of the judgments analyzed is from September 2011 to December 2019. The authors have chronologically looked at the judgments collected by using a combination of keywords 'polluter pays', 'polluter pays principle', 'liability', 'compensation' and 'damages' on two databases, viz, SCC OnLine and Manupatra.

This paper is divided into five sections, in addition to introduction and conclusion. The first section introduces the PPP as propounded both at the domestic level in India and globally. The next section discusses the definitional issues that exist with the principle, particularly the meaning of the terms 'pollution' and 'polluter'. This discussion is made based on the interpretation of the terms in relevant judgments of the NGT. Having discussed what comprises as pollution and who can be the polluters, the next section analyzes various methods that have been adopted by the NGT to calculate compensation due to individual victims as well as the cost for

[5] S. 20, The National Green Tribunal Act, 2010.
[6] Supra 3, at 14.
[7] The NGT has attracted the attention of scholars and resultantly literature has been emerging on the NGT in general and specifically on the PPP. For a general work on the NGT, see G. N. Gill, *Environmental Justice in India: The National Green Tribunal* (2017). For a specific discussion on the PPP, see C. Bhushan, S. Banerjee & I. Bezbaroa, *Green Tribunal, Green Approach: The Need for Better Implementation of the Polluter Pays Principle*, Centre for Science and Environment (2018), available at http://www.indiaenvironmentportal.org.in/files/file/green-tribunal-green-approach-report.pdf; U. Tandon, *Green Justice and the Application of Polluter-Pays Principle: A Study of India's National Green Tribunal, 13* OIDA Journal of Sustainable Development 35-46 (2020).

restitution of damaged property and environment by the polluters in cases of pollution. These range from the principle of guesswork or rough estimation due to lack of required data to formation of high-powered committees to determine the compensation to exactitude. The final section discusses the judgments in which the NGT has ventured beyond the restorative purpose of PPP and has expanded the scope of PPP to include punitive purposes as well. This is followed by the concluding section that captures the major discussions in the paper.

II. PPP AS A LEGAL PRINCIPLE IN INDIA

The PPP is based on the idea of cost allocation and cost internalization, that is, the external costs of production and/or consumption of goods and services should be allocated to the polluter responsible for the pollution rather than to the government or to the members of the public.[8] It means the polluter must bear the expenses of carrying out measures decided by public authorities to ensure that the environment is in an acceptable state. It also includes the cost of paying compensation to the victims of pollution.

In India, PPP has been made a part of environmental law first by the higher judiciary and subsequently through its statutory recognition in the National Green Tribunal Act, 2010. *Indian Council for Enviro-Legal Action* v. *Union of India*[9] (**"Bichhri"**) was the first case where PPP was applied by the SC. This case dealt with the adverse environmental health impacts of water and soil pollution in Bichhri and its surrounding villages in the State of Rajasthan on account of dumping of untreated wastewater and sludge by chemical industries. The SC observed that once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any person by his activity irrespective of the fact whether he/she had taken reasonable care while carrying on the activity. The Court recognized that the polluter was liable for making good any damage caused to the environment through its act.

[8] Supra 4, at 35-37.
[9] Indian Council for Enviro-Legal Action v. Union of India, (1996) 3 SCC 212.

Subsequently in *Vellore Citizens' Forum* v. *Union of India and Ors.*[10], a case against the discharge of untreated effluent by tanneries in the State of Tamil Nadu into a nearby river and land, the SC relied on the constitutional mandate[11] to protect and improve the environment to hold that the PPP is part of the domestic environmental law in India.[12] The Court also relied upon customary international law[13] and read PPP as an essential feature of sustainable development.[14] Both these cases have been relied upon in several decisions[15] thereafter by courts in India which shows that the principle has been incorporated into domestic environmental jurisprudence in India.

In 2010 with the enactment of the National Green Tribunal Act, 2010[16] (**"NGT Act"**), a specific forum was created for addressing environmental disputes in India. The concept of PPP here, received a statutory recognition.[17] The NGT Act explicitly states PPP as a guiding principle while passing any order, decision or award by the NGT.[18] The relief, compensation and restitution that the NGT may award under this statute is defined in terms of compensation to the victims of the pollution and environmental damage, restitution of property damaged and of the environment.[19] Pertinent questions related to the lived experience of the principle are—how the term 'pollution' and consequently the term 'polluter' have been understood while applying PPP? What methods have been applied to determine the quantum of compensation? Whether the underlying objective of PPP has been exclusively restitutive in nature or punitive as well? What mechanisms have been adopted to ensure the

[10] Vellore Citizens' Forum v. Union of India and Ors., (1996) 5 SCC 647.
[11] Arts. 48-A & 51-A(g), the Constitution of India.
[12] In Bichhri, the Court referred to Articles 48A and 51-A(g) however, the PPP was not read into them.
[13] Vellore Citizens Welfare Forum v. Union of India, AIR 1996 SC 2715.
[14] This principle, as explained in the Brundtland Report [1987], is most commonly defined as development that meets the needs of the present without compromising the ability of the future generations to meet their own needs. It requires meeting the basic needs of all and extending to all opportunity to satisfy their aspirations for a better life.
[15] M.C. Mehta v. Kamal Nath, AIR 1997 SC 388; M.C. Mehta v. Union of India, AIR 1997 SC 734; S. Jagannath v. Union of India, AIR 1997 SC 811.
[16] The NGT was established on 18th October, 2010, vide notification No. S.O 2569(E) under the National Green Tribunal Act, 2010.
[17] S. 20, The National Green Tribunal Act, 2010.
[18] Ibid.
[19] S. 15, The National Green Tribunal Act, 2010.

receipt of compensation by deserving individuals or victims of environmental pollution? How has the payment by polluters been used for the purpose of restoration of the environment? The remaining part of this paper critically addresses and analyses some of these questions in the light of cases decided by the NGT.

III. POLLUTION, POLLUTER AND DEFINITIONAL ISSUES

The application of PPP is contingent on defining pollution and identifying one or more polluters. The term 'pollution' as defined in three major pollution related laws in India (The Environment Protection Act, 1986[20], The Water (Prevention and Control of Pollution) Act, 1974[21] and The Air (Prevention and Control of Pollution) Act, 1981[22]) which prescribe certain constitutive elements—presence of 'any solid, liquid or gaseous substance present in such concentration as may be, or tend to be, injurious to environment; such concentration 'may be or tend to be injurious to human being or other living creatures or plants or property or environment'; and such presence that 'may, or is likely to, create a nuisance or render such water harmful or injurious to public health or safety, or to domestic, commercial, industrial, agricultural or other legitimate uses, or to life and health of animals or plants or aquatic organisms.'

Thus, 'pollution' in law is distinct from pollution as understood in common parlance. It requires a certain level of 'concentration' of pollutants and must be 'injurious' to human beings, their property or the environment. The threshold limit of this 'concentration' of pollutants is supposed to be fixed on the basis of scientific information and analysis. To put it differently, environmental law in India does not venture to keep the environment to an imagined historical quality. Instead, it seeks to prescribe a level of reasonable tolerance probably because of the understanding that virtually every action of human beings has implications for environment in one way or other. Understanding the legal meaning of the term 'pollution' in this way may require any legal forum, including the NGT, to first ascertain the

[20] S. 2(c), The Environment Protection Act, 1986.
[21] S. 2(e), The Water (Prevention and Control of Pollution) Act, 1974.
[22] S. 2(b), The Air (Prevention and Control of Pollution) Act, 1981.

'pollution' and 'polluter' by following the legal definition in order to apply PPP. The practice of the NGT, however, does not show such a systematic singular pattern in determining the 'pollution' and 'polluter'. The practice seems to be complex with multiple ways of applying the terms 'pollution' and 'polluter'.

There is a set of cases that show a peculiar practice of treating certain activities as 'deemed to be polluting' and the NGT has applied PPP in such cases. In *Dr. Karan Singh* v. *State of Himachal Pradesh*[23], the NGT directed that,

> [T]he Municipal Corporation of Shimla and Solan may consider the collection of proper monetary contribution for disposal of Municipal Solid Waste (MSW) depending on the kind and size of the houses on the principle of "Polluter Pays" and charge such amounts as it may deem fit to the households within their limits.[24]

In *Kamal Anand* v. *State of Punjab*[25] , the corporation was directed to charge every household, shop, hotel or any industrial building to pay the specific amount along with the property tax payable for the property, or on monthly basis, whichever is permitted by the concerned authorities based on PPP. Similarly, in *Manoj Misra* v. *Union of India*[26] , a case against pollution in river Yamuna, the NGT granted liberty to the Corporation and the Delhi Jal Board to collect funds from the general public based on PPP. It added that the safest criteria for determining the quantum of environmental compensation payable by people of Delhi would be the certain percentage of the property/house tax payable by an individual.

In *Court on its own motion* v. *State of Himachal Pradesh*,[27] the NGT created a specific fund called the 'Green Tax Fund' to ensure proper development for protecting the environment in all its spheres. Through this, the NGT required the persons who were travelling by public or private vehicles to the glacier of Rohtang Pass to pay a reasonable sum of money of Rs. 100 for heavy vehicles and Rs. 50 for light vehicles as a contribution based on

[23] Dr. Karan Singh v. State of Himachal Pradesh, 2013 SCC OnLine 884.
[24] Ibid.
[25] Kamal Anand v. State of Punjab, 2014 SCC OnLine NGT 6893.
[26] Manoj Misra v. Union of India, 2015 SCC OnLine NGT 840.
[27] Court on its own motion v. State of Himachal Pradesh, 2014 SCC OnLine NGT 1.

PPP. It also imposed Rs. 20 per tourist travelling through CNG or electric buses to Rohtang pass as tourists.

These and other similar cases[28] show that the NGT has adopted the approach of 'deemed to be polluting'. The application of PPP in each of the above cases shows that it is not contingent on a particular threshold for pollution being crossed by the concerned entities or individuals. For instance, despite of the fact that vehicles plying on the road, largely, have a pollution clearance certificate, the NGT directed them to pay for the pollution they cause. In the case of Rohtang Pass, the Court directed all users of all kinds of vehicles (including electric vehicles) plying in the region to deposit a sum in the Green Tax Fund. In as much as adoption of the theory is a welcome step, for the purpose of achieving complete internalization of such costs, these measures must not be restricted to ecologically sensitive regions as seen in the case of *Court on its own motion* v. *State of Himachal Pradesh*[29]. They must rather be imposed on every vehicle plying on the road for the very reason that their plying on the roads will cause pollution in the environment. This view is further complemented by the fact that natural resources such as air and water cannot be defined to be limited to a particular territory or region in that sense and in the long run the consequences of their exploitation are to be borne by everyone. An example of such cost internalization is seen in *Kamal Anand* v. *State of Punjab*[30] where every household, shop, hotel or any industrial building due to their very nature that they generate waste was required to deposit a particular sum just like house/property tax.

Overall, this approach is not based on any legal definition of pollution, instead on the basis of an assumption of the inherent polluting nature of certain activities and the consequent application of PPP. In other words, it may be difficult in many of these cases, if not all, to establish 'pollution in law'. Another key feature of these cases is that they are of continuing

[28] See Subhas Dutta v. Union of India, 2018 SCC OnLine NGT 345; Manoj Misra v. Union of India, 2015 SCC OnLine NGT 840; Almirah H. Patel v. Union of India, 2015 SCC OnLine NGT 679; All Dimasa Students Union Dima Hasao District Committee v. State of Meghalaya and Ors., 2015 SCC OnLine NGT 697.
[29] Court on its own motion v. State of Himachal Pradesh, 2014 SCC OnLine NGT 1.
[30] Kamal Anand v. State of Punjab, 2014 SCC OnLine NGT 6893.

nature, as opposed to one-off incidents such as industrial accidents. In addition to that, there is no one or more identifiable polluters in these cases. The process of pollution in such cases is continuous, incremental and decentralized. It appears that the NGT has evolved a practice of applying PPP to cases of continuous, incremental and decentralized pollution without engaging with the question of violation of rules involved.

There are also cases where the NGT has emphasised the fact of pollution and then proceeded to apply PPP. For instance, in *Samir Mehta* v. *Union of India,*[31] a case of accidental oil spill in ship M.V. Rak Carrier in the Arabian Sea, the NGT relied on damage to the mangroves and marine ecology in the Bombay coast due to the oil spillage. Similarly, in *Kasala Malla Reddy* v. *State of Andhra Pradesh*[32] the NGT highlighted groundwater and air pollution due to industrial units.

In certain cases,[33] the NGT has taken violation or non-compliance with laws as a valid condition to apply PPP. For instance, in *Gurpreet Singh Bagga* v. *Ministry of Environment and Forests and Ors.*[34] the NGT directed the respondent companies to pay money for running mining activities in an unauthorized manner, without Environmental Clearance (**"EC"**) and consent by the concerned State Pollution Control Board (**"SPCB"**). Similarly, in *The Proprietor M/s. Varuna Bio Products* v. *The Chairman Tamil Nadu Pollution Control Board,* a chemical industry was alleged to be operating without obtaining the required consent. The NGT observed that even though no effluents were discharged by the operation of the unit, it was operating without obtaining the required consent. The NGT, therefore, directed the offending industry to pay an amount of Rs. 25000 under PPP. It appears that mere violation of law was treated as sufficient to apply PPP regardless of damages to individuals, their property or the environment.

There are mainly three patterns visible from the above-discussed cases. First, certain activities which are continuing in nature and where there is no identifiable polluter or small group of polluters, the NGT has treated

[31] Samir Mehta v. Union of India, 2016 SCC OnLine NGT 479.
[32] Kasala Malla Reddy v. State of Andhra Pradesh, 2017 SCC OnLine NGT 1914.
[33] See T. N. Godavarman Thirumulpad v. Union of India, 2016 SCC OnLine NGT 1196
[34] Gurpreet Singh Bagga v. Ministry of Environment and Forests and Ors., 2016 SCC OnLine NGT 92.

them as 'deemed to be polluting' and applied PPP without ascertaining whether such activities fit within the legal definition of pollution. Many of these activities are probably without any violation of environmental laws, although they may be polluting in fact. Second, there are obvious cases of pollution such as oil spillage incidents where damage to the environment has been explicitly recognised. Third, there are cases where the NGT has underlined explicitly that there was no discharge by the respondent company, still PPP was applied on the ground that the respondent company was in violation of environmental law norms.

While the idea of getting all polluters to pay for pollution seems progressive, it needs to be underlined that such a practice must not lead to the emergence of a 'right to pollute' for those who are able or willing to pay. In other words, the ultimate goal is not to have a heavy green fund or more instances of application of PPP, but an eco-friendly mode of life which necessarily involves a dramatic change in the modes of production and consumption that are prevalent now.

IV. CALCULATION OF COMPENSATION: SEARCHING FOR A CONSISTENT METHOD

Calculation of compensation is the next important step once the question of pollution and polluter is answered affirmatively. The cost to the polluter may include compensation to individual victims as well as the cost for restitution of damaged property and environment. The ideas of compensation and restitution presupposes the need for measuring the damages. It is also expected that the payment by the polluter under PPP is proportionate to the measured damages. However, the practice followed by the NGT shows a different scenario where measurement of damages is hardly undertaken or relied upon for various reasons.

In *Samir Mehta* v. *Union of India*[35] , the NGT held respondent companies responsible for oil spill and pollution caused by sinking of the ship. It was observed that the ship was not in a seaworthy condition. The NGT noted that there are multiple sources of pollution, resulting from oil spill, sinking

[35] Supra 31.

of the ship and its cargo. They affect the marine environment that includes sea water, aquatic life, shore, sea bed, mangroves, tourism and public life of the people living at the shore and the adverse impacts are also seen at multiple beaches. However, the NGT found it difficult or impossible to measure the damages for the purpose of applying PPP. It was held that:

The damage caused by pollution, cannot be computed in terms of money with exactitude and precision. This has to be on the basis of some hypothesizing or guess work as in necessary to be applied in such cases. For instance, damage caused to the aquatic life, mangroves, sea shore and tourism are incapable of being computed exactly in terms of money.[36] (emphasis added)

The NGT has admitted that the environmental damages are incapable of being measured in terms of money with 'exactitude and precision', therefore it supported the method of 'hypothesizing or guess work'. By following this method, the NGT arrived at an amount of Rs.100 crores. Besides the monetary compensation imposed, all the respondent companies were held jointly and severally liable for removing the ship wreck and cargo from its present location.

In *Deshpande Jansamsaya Niwaran Samiti* v. *State of Maharashtra,*[37] the NGT relied on guesswork and observed that 'in the absence of factual information available the Tribunal has to decide on guess work (uncertainty) about the environmental damages'.[38] The NGT justified the method of guesswork as out of helplessness by stating the fact that the responsible agencies failed to provide necessary data and information to it. The NGT had sought details of air and water quality assessment by the Maharashtra Pollution Control Board (**"MPCB"**) to ascertain the environmental damage and impact caused due to non-compliance in operations of Municipal Solid Waste. However, the MPCB failed to furnish it. In order to address such problems in future, the NGT urged the MPCB through its Chairperson to develop a specialized group within the

[36] Ibid, at 136.
[37] Deshpande Jansamsaya Niwaran Samiti v. State of Maharashtra, 2014 SCC OnLine NGT 1310.
[38] Ibid.

organization which would focus on scientific and technological research, analysis and interpretation of environmental data, new and clean technologies, besides scientific dissemination of information. Here the NGT did not follow the understanding that the damages were incapable of being assessed, but relied on guesswork for not being supplied with adequate information to assess damages by competent agencies.

Similarly, in *Gurpreet Singh Bagga* v. *Ministry of Environment and Forests and Ors.*[39] the NGT was forced to apply the principle of guesswork while resolving the issue, as despite the directions of the Court, both governments of State of Haryana and State of Uttar Pradesh failed to place on record any report which defined the damage caused due to the wrongful acts (illegal sand mining in district Saharanpur more particularly on the river banks and bed of river Yamuna) and the exact money that would be required for restoration, restitution and revitalization of the environment, ecology and bio-diversity with particular reference to river Yamuna. While applying the principle of guesswork in determining the compensation the NGT observed that, while 'it is not possible to determine such liability with exactitude but that by itself would not be a ground for absolving the defaulting parties from their liability'. Therefore, on approximate basis using the available documentary evidence and reports a sum of Rs. 50 crores were imposed on each of the respondents who were carrying on the extraction of minerals and Rs. 2.5 crores on each of the stone crushers/screening plants which had been running illegally, in an unauthorized manner for continuous defaults and violation of the laws and specific terms and conditions of the EC and for their operation without consent of the concerned authorities including the SPCB.

The method of guesswork does not seem to be uncommon. It has been applied in other cases too.[40] At the same time, the method of guesswork or approximation does not seem to be NGT's invention. In fact, the NGT

[39] Gurpreet Singh Bagga v. Ministry of Environment and Forests and Ors., 2016 SCC OnLine NGT 92.

[40] See Deshpande Jansamsaya Niwaran Samiti v. State of Maharastra, 2014 SCC OnLine NGT 1310; Gurpreet Singh Bagga v. Ministry of Environment and Forrest and Ors., 2016 SCC OnLine NGT 92; T. N. Godavarman Thirumulpad v. Union of India and Ors., 2016 SCC OnLine NGT 1196; Jalbiradari v. Ministry of Environment and Forrest, 2016 SCC OnLine NGT 168; Samir Mehta v. Union of India, 2016 SCC OnLine NGT 479.

validates the application of this method by relying on the SC's decision in *A.P. Pollution Control Board* v. *Prof. M.V. Nayudu (Retd.)*[41] and notes that the principle of 'limited' guesswork is an 'accepted principle'. The SC observed that uncertainty is a problem when scientific knowledge is institutionalized in policy making or is used as a basis for decision making by agencies or courts. Where the scientists have a liberty to modify variables or models when more information is available, the agencies and courts have to make decisions based on existing data. In as much as it is being accepted that it is difficult for the NGT to take decisions in the absence of any tool to assess the damages (lack of reports by the State governments in this case), there exists a need for the Tribunal to find alternatives.

The method of guesswork or approximation is not the only method of calculation the NGT has relied on. There are at least two other methods. First, in certain cases,[42] the size of the respondent company was taken into consideration. For instance, in *The Proprietor M/s. Varuna Bio Products* v. *The Chairman Tamil Nadu Pollution Control Board* [43] and *C. Murugan* v. *Member Secretary Karnataka*[44], the NGT apparently determined the amount of compensation by taking into consideration the size of the company.

Second, in certain cases the NGT has calculated the compensation on the basis of the cost of the project in question. In *Tanaji Balasaheb Gambhire* v. *Union of India,*[45] the Applicant has sought directions against M/s. Goel Ganga Developers India Private Limited, who were alleged to have constructed a commercial and residential complex. The applicant sought directions to demolish the illegal structures at the site in question and restore the area to its original position. The NGT found truth in the allegations made and directed the respondent, M/s. Goel Ganga Developers India Private Limited to pay environmental compensation cost

[41] A.P. Pollution Control Board v. Prof. M.V. Nayudu (Retd.), (1999) 2 SCC 718.
[42] See Forward Foundation v. State of Karnataka, 2015 SCC OnLine NGT 5; Tanaji Balasaheb Gambhire v. Union of India, 2016 SCC OnLine NGT 4213; S.P. Muthuraman v. Union of India, 2015 All (I) NGT Reporter (2) Delhi 170; Manoj Misra v. Union of India and Ors., 2015 SCC OnLine NGT 840; Krishan Lal Gera v. State of Haryana, 2015 SCC OnLine NGT 194; Krishnan Kant Singh v. National Ganga River Basin Authority and Ors.
[43] The Proprietor M/s. Varuna Bio Products v. The Chairman Tamil Nadu Pollution Control Board, 2015 SCC OnLine NGT 138.
[44] C. Murugan v. Member Secretary Karnataka, 2015 SCC OnLine NGT 8.
[45] Tanaji Balasaheb Gambhire v. Union of India, 2016 SCC OnLine NGT 4213.

of Rs. 100 crores or 5 per cent of the total cost of the project to be assessed by the State Level Express Appraisal Committee (**"SEAC"**) whichever is less for restoration and restitution of environment damages and degradation caused by the project by carrying out the construction activities without the necessary prior environmental clearance within a period of one month. In addition, Rs. 5 crores were required to be paid for contravening mandatory provisions of several environment laws in carrying out the construction activities, exceeding limit of the available environment clearance and for not obtaining the consent from the Board. The NGT further imposed fine of Rs. 5 Lakhs upon the Pune Municipal Corporation (**"PMC"**) and directed the Commissioner PMC to take appropriate action against the erring officers.

In a review application[46] the NGT held the order to be erroneous for two reasons. First, it was observed that the Tribunal had come to a conclusion that the project proponent must be saddled with exemplary and deterrent compensation (more than the estimated compensation) but had adopted a soft approach later. *Secondly*, estimating the cost on the lower side, i.e. Rs. 100 crores or 5 per cent of the total cost of the project whichever is lower, the Tribunal was undermining the rigour of the law of the land. Therefore, after calculating the damages in terms of Carbon Foot Print[47] as amounting to 190 crores, the direction was modified to Rs. 190 crores or 5 per cent of the total cost of the project to be assessed by SEAC whichever is more.

In an appeal against both the above orders, the SC rejected both the grounds provided by the review court to fix the compensation. The SC refused to impose special damages on the basis that this was not a public interest litigation as the applicant was also one amongst those who had applied for a flat with the project proponent and was therefore an

[46] Tanaji Balasaheb Gambhire v. Union of India, 2018 SCC OnLine NGT 302.

[47] It means Carbon dioxide units which were added to the environment in the process of releasing energy necessary for production of material used in development. The Tribunal acknowledged that the concept of Carbon Foot Print does not find place in the EIA Manual, MOEF/SEIAA Guidelines for presentation of standard terms of reference, Environment (Protection) Act, 1986 and Rules framed thereunder, Environmental Clearance Regulations, 2006 and amendments thereto and National Green Tribunal Act, 2010 and Rules framed thereunder, but this does not per se lessen its importance in computation of environmental compensation without giving thought to its scientific merits.

interested party. With regard to the question of assessment on damages on basis of carbon foot print the SC observed that the courts cannot introduce a new concept of assessing and levying damages unless expert evidence in this behalf is led or there is some well-established principle. It added that this evidence is used to compensate and impose damages on nations but the court cannot apply the method while imposing damages on persons who violate Environment Clearance and this method is not part of any law, rule or executive instructions. Finally, the court ordered the compensation required to be paid by the respondent, M/s. Goel Ganga Developers India Private Limited would be Rs. 100 crores or 10 per cent of the project cost, whichever is higher, on the project proponent.

In other decisions[48] where the payment was made contingent on the size of the industry or project by the NGT, it has relied on the SC's decision in the case of *Goa Foundation* v. *Union of India*[49] where the Court directed the respondents to deposit 10 per cent of the value of the mineral extracted at the first instance. Reliance has also been placed on *Sterlite Industries India Ltd.* v. *Union of India*[50] where notional damages based on 5 per cent of the capital cost were imposed as there did not exist enough material to enable the Tribunal to compute damages based on exactitude. In five such cases,[51] the fine imposed was at the rate of 5 per cent of the cost of the project. Such penalties were quoted as the initial amount of deposit to be made by the polluting industries (notional damages); however, this percentage remained unchanged even in the final order/judgment delivered by the Tribunal based on committee reports.

It is to be noted that the NGT has also relied upon methods other than awarding compensation. In a series of cases,[52] the NGT has refrained from

[48] Forward Foundation v. State of Karnataka, 2015 SCC OnLine NGT 5; Tanaji Balasaheb Gambhire v. Union of India, 2016 SCC OnLine NGT 4213; S.P. Muthuraman v. Union of India, 2015 All (I) NGT Reporter (2) (Delhi) 170; Manoj Mishra v. Union of India and Ors., 2015 SCC OnLine NGT 840; Krishan Lal Gera v. State of Haryana, 2015 SCC OnLine NGT 194.
[49] Goa Foundation v. Union of India, (2014) 6 SCC 590.
[50] Sterlite Industries India Ltd. v. Union of India, 2013 4 SCC 575.
[51] Supra 48.
[52] See Jagat Narayan Viswakarma v. Union of India, 2014 SCC OnLine NGT 2685; Shiv Prasad v. Union of India, 2014 SCC OnLine NGT 3044; Manoj Misra v. Union of India, 2015 SCC OnLine NGT 840; Manoj Misra v. Delhi Development Authority and Ors.,

quoting a particular amount of compensation and instead ordered the remedial steps to be undertaken by the polluter to restore the environment and make good the loss caused to the ecology. These steps include installation of pollution control devices. Remedial steps or restoration of the environment, even though different from imposition of monetary compensation, is indeed a goal of PPP.

In *Jagat Narayan Viswakarma* v. *Union of India,*[53] the NGT directed the Chief Secretaries of State of Uttar Pradesh and State of Madhya Pradesh to direct all the large industries operating in that area including and particularly the thermal power plants to provide, install and commission reverse osmosis plants of reasonable capacity commensurate with the local demands to ensure supply of uncontaminated drinking water to all the affected villages which are located in the critically polluted areas by invoking the PPP. This is an application of PPP as the industries were asked to remedy the damage caused to the water by their discharge of effluents. Similarly, in *Shiv Prasad* v. *Union of India*,[54] the NGT directed the SP of the concerned districts and the Deputy Commissioner to ensure that the entire slag stored in the river or on the river bed is removed at the cost of all industries located in this industrial pocket.

All the three methods explained above do not go well with the underlying objective of restitution as understood in civil law. While the method of guesswork or approximation is patently irreconcilable with the idea of restitution, the imposition of higher penalties on larger size industries may create a problem in situations where the damage caused by them may be minimal and vice versa. The whole concept of cost internalization through the mechanism that the external costs of production and/or consumption of goods and services are allocated to the polluter responsible for the pollution rather than to the government or to the members of the public is defeated. Therefore, such imposition has no rationale with the object of the recognition of the PPP and requires reconsideration. While, the NGT

2017 SCC OnLine NGT 966; We the People, The General Secretary v. Union of India, 2018 SCC OnLine NGT 1824.

[53] Jagat Narayan Viswakarma v. Union of India, 2014 SCC OnLine NGT 2685.

[54] Shiv Prasad v. Union of India, 2014 SCC OnLine NGT 3044.

has justified these methods on pragmatic grounds, the question is whether pragmatism may be allowed to undermine the consistency and rule of law basis of the process of environmental adjudication in India?

V. RESTORATIVE AND PUNITIVE PURPOSES OF PPP

PPP, as understood in the context of environmental law in India, seeks to impose the financial burden on polluters to compensate the victims, damages to their property and environmental damages. A plain understanding of PPP, therefore, will place it in civil law and understandably serves restorative purpose. Most of the cases discussed above, indeed, promote such an understanding of PPP where the responsibility of the polluter is discussed in terms of remedying the damages to persons and the environment. However, there are cases where the NGT has expanded the scope of PPP to include punitive purpose as well.

The NGT, in *T.N. Godavarman Thirumulpad* v. *Union of India and Ors.,*[55] explicitly underlined the 'twin objectives' of payment of compensation by polluters, vis, compensating the victims of the loss they suffered and infliction of punitive consequences on the defendants. In *Tanaji Balasaheb Gambhire* v. *Union of India,*[56] the NGT imposed on defendant company Rs. 5 crores for contravening mandatory provisions of several environment laws in carrying out the construction activities, exceeding limit of the available environment clearance and for not obtaining the consent from the Board. This was in addition to the environmental compensation imposed. The NGT has also endorsed the idea of using PPP to saddle the polluters with 'exemplary and deterrent compensation'.[57] In *Lakhan Singh* v. *Rajasthan State Pollution Control Board and Ors.*[58] the NGT imposed a penalty to the extent of one per cent of annual gross turnover on all the

[55] T.N. Godavarman Thirumulpad v. Union of India and Ors., 2016 SCC OnLine NGT 1196.
[56] Tanaji Balasaheb Gambhire v. Union of India, 2016 SCC OnLine NGT 4213.
[57] Tanaji Balasaheb Gambhire v. Union of India, 2018 SCC OnLine NGT 302.
[58] Lakhan Singh v. Rajasthan State Pollution Control Board and Ors., 2016 SCC OnLine NGT 4178.

non-complaint units in RIICO Industrial Area Kaladera, Tehsil Chomu, District Jaipur on PPP.

The NGT's expansive understanding of PPP seems akin to the SC's expansive interpretation of liability in cases of hazardous industries and activities. While recognising the principle of absolute liability in the context of hazardous or inherently dangerous industries, the SC accepted the deterrent objective as well. It was held that *"the measure of compensation…must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deferent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it…"*[59] The NGT seems to be carrying forward this understanding endorsed by the SC in the late 1980s.

VI. CONCLUSION

The application of PPP by the NGT is characterised with inconsistent practices. It appears that the NGT adopts a 'pollution in fact' meaning instead of 'pollution in law' in many instances because there is hardly any discussion to ascertain whether the alleged pollution in question falls within the legal definition of pollution as provided in environmental statutes. There are also cases where compensation was imposed by invoking PPP even when the NGT had not found any instance of pollution.

Fixing the quantum of compensation is another key controversial area. An analysis of NGT judgments show a shift in the assessment of damages from an approach based on mere guesswork to the appointment of expert committees to evaluate the loss and cost of remediation. Further, on multiple occasions, the NGT has adopted an alternative approach of specifying the acts to be undertaken by the polluter as against the imposition of compensation. It appears that the NGT has also promoted a shift by internalizing the cost through the imposition of fees/spot fines/appropriate policy mechanisms to be developed by local authorities. In a particular case,[60] the NGT went to the extent of rewarding those

[59] M.C. Mehta v. Union of India, AIR 1987 SC 1086.
[60] Almitra H. Patel v. Union of India, 2015 SCC OnLine NGT 679.

complying with the pollution norms with a 10 per cent rebate on house/property tax.

While such an approach is welcome, there exists an increased need for the NGT to adopt a uniform mechanism for the estimation of compensation to be awarded to the victims and for remediation of the damaged environment. The shift of the NGT to refer determination of compensation to experts is also a step forward. Effective utilization must also be made of the experts in the panel of judges determining such disputes since the whole purpose of the establishing the NGT was to allow specialized personnel in the field to bring their knowledge in multidisciplinary issues relating to the environment onboard.

Finally, there exists a need to assess whether adequate compensation is reaching the victims of pollution at all.[61] Rule 35(4) of the National Green Tribunal (Practice and Procedure) Rules, 2011 requires a separate account to be created and maintained by the fund manager in order to receive and disburse amounts pursuant to orders or awards of the NGT. However, a report[62] points out that the Fund Manager has not kept any separate account for contributions to the Environment Relief Fund as a result of awards or orders made by the NGT for compensation or relief for environmental damage. This raises questions as to the actual impact of PPP in restoration of environment.

It appears that PPP is being applied liberally and for multiple purposes. At the same time, there is a shadow of doubt as to its positive impacts on restoration of the environment and remediation of damages to individuals and their property. There seems to be a significant gap between what PPP promises and what has actually been achieved in reality.

[61] Gyan Prakash v. Ministry of Environment, Forest and Climate Change ("MoEF&CC"), O.A. No. 86 of 2020, filed before the NGT, highlighted the non-utilization of more than Rs.eight hundred crores meant towards the Environment Relief Fund under both the Public Liabilities Insurance Act, 1991 and the NGT Act, 2010. The NGT directed the MoEF&CC, being the nodal Ministry, to take necessary action for disbursement of funds.
[62] D. Sinha, *The Management of Environment Relief Fund*, Vidhi Centre for Legal Policy (2020), available at https://vidhilegalpolicy.in/wp-content/uploads/2020/06/Management_of_ERF_Debadityo_Sinha_VCLP_2020.pdf.