

Case Note

Access to Information as Ruled by the Indian Environmental Tribunal: *Save Mon Region Federation v. Union of India*

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On 14 March 2013, the National Green Tribunal of India passed an order in an ongoing statutory appeal against the environmental approval granted to a hydropower project. The order related to the preliminary issue of condoning a delay in the filing of the appeal. The Tribunal attributed a significant part of the delay to the nondisclosure of complete information regarding the approval. The delay in filing was condoned as concerned authorities had not complied with the relevant environmental regulations. Although the order did not address the merits of the case, it is of great significance for the Indian environmental justice system since it grapples with one of the key hurdles in the regime – poor access to information – and thus has the potential to transform the environmental regulatory space by making it more transparent. Environmental decision-making processes, particularly in the developing countries, are often opaque and inaccessible. India's experience in striving to improve its processes may thus provide useful lessons for other jurisdictions.

INTRODUCTION

The National Green Tribunal in India was set up under the National Green Tribunal Act of 2010 (NGT Act) as a specialized judicial body for 'effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources'.¹ Its jurisdiction extends to civil cases involving a 'substantial question relating to the environment',² with regard to the environmental laws listed in the Schedule to the NGT Act.³

The NGT is comprised of judicial and expert members, and headed by a retired judge of the Supreme Court.⁴ It enjoys all the powers of a civil court and yet has a fair degree of flexibility in its functioning as it is not required to strictly follow all procedural laws.⁵ Cases that fall within the NGT's jurisdiction cannot be heard by any other civil court,⁶ making it perhaps the most important forum for environmental adjudication in the country.

In the two years since it has been constituted, the NGT has heard cases on a wide range of issues – environmental approvals granted to power projects and industries, air, water and noise pollution, solid waste and biomedical waste management, encroachment on river beds, reduction in tree cover and so on. Without doubt, it has played a significant part in bringing environmental matters to the forefront of public discourse. It is too early to assess the NGT's overall impact on Indian environmental regulation and jurisprudence. Nevertheless, orders such as the *Save Mon Region Federation*⁷ order discussed in this note are hopeful indicators that the NGT can potentially transform environmental decision-making processes by making them more transparent and by increasing the accountability of the actors involved.

THE SAVE MON REGION FEDERATION CASE

On 19 April 2012, the Ministry of Environment and Forests (MoEF) of the Indian Government granted an environmental approval to the 780 MW Nyamjang Chhu hydro-power project in the Tawang district of

¹ The National Green Tribunal Act, 2010 ('NGT Act'), preamble, found at: <<http://www.moef.nic.in/downloads/public-information/NGT-fin.pdf>>.

² NGT Act, n. 1 above, Section 14(1), read with Section 2(m).

³ The Schedule includes legislation on general environmental protection, air and water pollution, forest conservation and biodiversity. Orders issued under these legislations can be appealed against before the NGT under its appellate jurisdiction. See NGT Act, n. 1 above, Section 16.

⁴ Information about the NGT, as well as its orders and judgments, can be found at: <<http://www.greentribunal.in/>>.

⁵ NGT Act, n. 1 above, Sections 19(1), 19(3) and 19(4).

⁶ *Ibid.*, Section 29.

⁷ *Save Mon Region Federation & Another v. Union of India & Others*, Order of the National Green Tribunal, MA No. 104 of 2012 in Appeal No. 39 of 2012, 14 March 2013, found at: <[http://www.greentribunal.in/judgment/104-2012\(MA\)_14Mar2013_final_order.pdf](http://www.greentribunal.in/judgment/104-2012(MA)_14Mar2013_final_order.pdf)> ('*Save Mon Region Federation*').

Arunachal Pradesh – a state in the northeastern part of India. The approval was granted under the provisions of the Notification of 14 September 2006 pertaining to environmental impact assessment issued by the Indian Government under the Environment (Protection) Act 1986 (EIA Notification).⁸ The EIA Notification mandates that certain categories of projects⁹ obtain prior approval – or ‘environmental clearance’ (EC), as it is commonly referred to – before commencing work.¹⁰

The EC for the Nyamjang Chhu project was challenged before the NGT under its appellate jurisdiction¹¹ by a Tawang-based organization, Save Mon Region Federation – a group of citizens of the Monpa indigenous community – and Lobsang Choedar – a senior Buddhist Lama and social activist. The Union of India, through the MoEF, was made the first respondent in the case on the basis that it had granted the EC. The Arunachal Pradesh State Pollution Control Board, responsible for conducting the public consultation in the EC process and NJC Hydro Power Limited (the project developer) were arrayed as the second and third respondents, respectively.

ISSUES

The *Save Mon Region Federation* appeal was filed on the ninetieth day from the date on which the EC was issued. The first question that the NGT was required to adjudicate was whether there was sufficient cause for the delay in filing the case, or whether it ought to be dismissed as barred by limitation. Before the NGT could resolve this issue, it had to identify the date from which the limitation clock started ticking. This defined the key issue of the case: When is an EC order ‘communicated to’ a potentially aggrieved person?

THE LAW

Two legal provisions are relevant for the present discussion. The first is Section 16 of the NGT, which provides that a person filing an appeal against an EC must do so within thirty days from the date on which the EC order has been communicated to him. Beyond thirty days, a delay of up to sixty days may be condoned by the NGT if it finds ‘sufficient cause’ for such delay.¹² After the ninetieth day from the date of communication, the NGT is statutorily barred from entertaining an appeal.

The second provision is Regulation 10(i) of the EIA Notification,¹³ which lays down in mandatory form the manner in which an order granting EC has to be publicized by various stakeholders: the project developer has to prominently advertise the EC order along with the conditions and safeguards in at least two local newspapers; permanently display the order on its website; and submit copies of the order to local governmental authorities such as village *panchayats*. These bodies have to display the order at their offices for thirty days from the date of receipt. The MoEF is also required to place the EC on its website.

THE ORDER

A five-member bench of the NGT condoned the delay in the filing of the appeal. In an unusually detailed order, the NGT first analyzed the knotty issue of when an EC order is ‘communicated’ for the purposes of limitation under the NGT Act. As the NGT noted, unlike other statutes which compute the limitation period from the date on which an order is received by or served on a person, the NGT Act refers to the date on which the order is ‘communicated to him’. After a careful consideration of dictionary definitions of the word ‘communicate’ and its different connotations, the Bench observed that: ‘The action of communicating is precisely sharing of knowledge by one with another of the thing communicated.’¹⁴ The Bench stressed that communication is not a unilateral action, and that the receiver of the information must understand the information being communicated. In the context of an EC order, therefore, the Bench held that ‘sufficient knowledge of basic facts constituting the grounds of the order should be imparted fully and effectively to the person’.¹⁵ Mere intimation of the factum of the EC would not constitute communication. The clock would only start ticking when the complete order is communicated, including the conditions and safeguards based on which a potential appellant could file an appeal before the NGT.

The NGT gave additional reasons in support of this view. The right to appeal under the NGT Act has been granted to any person aggrieved by a statutory order.¹⁶

⁸ EIA Notification 2006 and subsequent amendments can be found at: <http://www.moef.nic.in/legis/env_clr.htm>.

⁹ *Ibid.*, Schedule.

¹⁰ The EC process includes undertaking an environmental impact assessment of the proposed project, public consultation and appraisal by expert committees.

¹¹ NGT Act, n. 1 above, Section 16(h).

¹² *Ibid.*, proviso to Section 16.

¹³ Interestingly, this provision was included in the EIA Notification through an amendment in December 2009. Until then, there was no requirement in the EIA Notification to publicize the grant of EC. The amendment came soon after an observation by the High Court of Delhi in a judgment, which stated that unless an EC order was made available in the public domain, a time-bound statutory remedy against the order before a special tribunal – at that time the National Environment Appellate Authority, the predecessor of NGT – was meaningless. See *Jan Chetna & Another v. Union of India & Others*, Judgment of the High Court of Delhi (14 October 2009), 184 [2009] DLT 752.

¹⁴ *Save Mon Region Federation*, n. 7 above, at paragraph 16.

¹⁵ *Ibid.*

¹⁶ NGT Act, n. 1 above, Section 16.

According to the NGT, 'any person' and 'aggrieved' have to be construed liberally.¹⁷ An individual (or entity or group), even if she did not have any direct or indirect interest in an order, and even if the nature of her grievance was general, could file an appeal before the NGT. Such a broad understanding of *locus standi* basically allows any member of the public to appeal against an order before the NGT. Given this conception of *locus standi*, the Bench considered it particularly important for the communication to be of a nature that allowed any member of the public to potentially be an appellant before it. Therefore, the NGT held, 'communication' could be deemed complete only when the full order of approval were available in the public domain and could be accessed without hindrance.

The Bench relied on Regulation 10(i) of the EIA Notification to delineate the criteria for when communication could be deemed to be complete within the meaning of Section 16 of the NGT Act. It held that the date from which the thirty-day period would commence would be the earliest of the following three dates: the date on which the full order could be accessed on, and downloaded from, the website of the MoEF; the date on which the full order could be accessed on, and downloaded from, the website of the project developer and was also published in the newspapers by the developer in accordance with the EIA Notification; the date on which local governmental authorities, such as the *panchayats*, displayed the entire EC order.

In the present case, the appellants contended that the EC order could be downloaded from the MoEF's website only on 8 June 2012 and therefore the limitation period should begin from that date, and not the date on which the EC was granted. An email from a MoEF official dated 5 June 2012 was produced before the NGT, in which it was admitted that the EC order for the Nyamjang Chhu project could not be uploaded on the MoEF's website due to technical difficulties. The appellants also produced an order of the Central Information Commission, the key body under the Right to Information Act of 2005, which had commented on the poor functioning of the MoEF's website, particularly the non-availability of EC orders, and had directed the MoEF to take immediate corrective action.¹⁸

¹⁷ A similar position had been held by the NGT in *Vimal Bhai & Others v. Ministry of Environment and Forests & Others*, Order of the National Green Tribunal, Appeal No. 5 of 2011 (14 December 2011), found at: <[http://www.greentribunal.in/judgment/5-2011_\(Ap\)_14dec_final_order.pdf](http://www.greentribunal.in/judgment/5-2011_(Ap)_14dec_final_order.pdf)>.

¹⁸ *Shibani Ghosh v. Ministry of Environment and Forests*, Order of the Central Information Commission (18 January 2012), found at: <http://www.rti.india.gov.in/cic_decisions/CIC_SG_C_2011_001398_16936_T_74418.pdf>. By way of full disclosure, the author was the complainant in the case before the Central Information Commission.

The MoEF contended that it had placed the EC order on its website on 22 May 2012. The project developer submitted that it had uploaded the EC order on its website on 30 April 2012, published the factum of the approval in the newspapers on 1 May 2012 and also circulated the order among village-level bodies. In response, the appellants informed the NGT that the project developer had no website. The NGT noted that the project developer had provided no proof of circulation of the order and the entire EC order had not been published in the relevant newspapers – just the factum of the grant of the EC.

Weighing these competing claims, the NGT arrived at a factual finding that the communication of the EC (within the meaning of Section 16) was not complete until the entire order was available on the Ministry's website on 8 June 2012. The appellants therefore had the comparatively lesser burden of explaining a delay of eight days, beyond the thirty-day period. Even if the Ministry's submission that it had uploaded the EC on 22 May 2012 was accepted, there was a delay of only 26 days, which was well within the NGT's discretion to condone if sufficient cause were shown.

On the question of what constitutes 'sufficient cause', the NGT referred to two sets of judgments of the Supreme Court of India pointing in different directions – one suggesting that the term 'sufficient cause' be liberally construed and the other supporting a relatively stricter construction. The NGT concluded that a middle path ought to be adopted, and that the law of limitation 'must receive a reasonable construction'. It held that:

Wherever the Court/Tribunal finds sufficient cause being shown and conduct of the applicant being bonafide, that is to say his approach and attitude is not that of negligence and inaction, he has approached the Court with clean hands and true facts and that there would be no grave and irretrievable injustice done to the other parties, the judicial discretion of the Court may be tilted more towards condoning the delay rather than shutting the doors to justice right at the threshold.¹⁹

The appellants explained that once they received all the relevant documents, no time was wasted in filing the appeal. The NGT found that the respondents had not been able to point out any instance of negligence on the part of the appellants. Furthermore, given that the respondents had themselves breached their statutory obligations in relation to timely 'communication' of the EC, it was hard for them to resist the appeal on the ground of delay. The appellants' delay in filing was thus condoned.

¹⁹ *Save Mon Region Federation*, n. 7 above, at paragraph 38.

UNPACKING SAVE MON REGION FEDERATION

The NGT's order in this case is on a preliminary issue, and turns on the interpretation of a procedural provision. But the order's significance and transformative potential becomes clear when seen through the prism of substantive constitutional and environmental rights that have been recognized in Indian law.

The last three decades have seen the development of a rich environmental jurisprudence in India, with the Supreme Court playing a pivotal role.²⁰ The right to life guaranteed by Article 21 of the Constitution of India has been read expansively to include various environmental rights such as the right to a clean and healthy environment.²¹ At the same time, the Supreme Court has also interpreted the fundamental right of a citizen to freedom of speech and expression²² to include the right to know and the right to be informed.²³ It has further held that the rights to information and community participation (towards the goal of furthering protection of the environment and human health) flow from the fundamental right to life.²⁴

For many years now activists and civil society groups have been protesting the paucity of information about the environmental approval process under the EIA Notification²⁵ – starting from the EIA documents, the agenda and minutes of meetings of expert committees appraising the project, to the final approval letters. It can be argued that this lack of access to complete information relating to crucial decisions in this realm is, in effect, a denial of people's fundamental right to information and public participation. It is also prejudicial to citizens' right to access environmental justice, since starting an effective legal challenge to a potentially harmful decision is very difficult in the absence of adequate information.

It is in this context that the seemingly innocuous requirement of making the complete EC order available

in the public domain in a time-bound manner takes on a larger significance. In environmental disputes, as in many others, time is of the essence. Not only because the NGT Act statutorily bars appeals after ninety days – thereby denying citizens an important statutory appellate mechanism – but also because a delay in halting projects or developments could lead to irreversible damage to the environment. Moreover, there is the potency of the *fait accompli* argument which is often presented to the courts to defend developmental activity that might otherwise violate environmental regulations. Seen from this perspective, the order of the NGT in *Save Mon Region Federation* is a small yet significant step in the right direction.

The principle laid down with respect to condoning the delay is legally sound. However, it also leads one to a further question: why has the legislature mandated an upper limit on the period of delay that can be condoned by the NGT? The principles the NGT applies to condone (or not) a delay from the thirty-first to the ninetieth day are also relevant after the expiry of this period of time. If the argument is that industry is greatly prejudiced by the possibility of legal action over an indefinite time period, the counter-argument is twofold. First, such legal challenges often involve (at least potentially) issues of public concern and therefore the absolute prioritization of policy and regulatory certainty for industry is not appropriate. Second, the NGT would, while exercising its judicial discretion, in any event, take into account the possible prejudice caused to the industry in question as a consequence of a delay.

With its mandate and powers, the NGT has the potential to transform environmental regulation in India. In *Save Mon Region Federation*, the NGT has forthrightly addressed a problem that has long plagued Indian environmental governance – the lack of timely and meaningful access to information. Broader systemic reform needs to follow.

TRANS-JURISDICTIONAL LESSONS?

The emerging jurisprudence of the NGT generally, and the *Save Mon Region Federation* order in particular, sheds light on issues significant to environmental law across national and jurisdictional frontiers. Other nations, particularly in the developing world, might benefit from observing India's experience with the NGT, and pondering the benefits of creating similar specialized 'green' judicial institutions. While doing so, the aspirational goal must be the implementation, to the greatest extent possible, of the three components of Principle 10 of the Rio Declaration 1992 – access to information concerning the environment, participation

²⁰ S. Ghosh, 'Judicial Activism and the Environment in India', 30 *South Asian Journal* (2010), 44.

²¹ L. Rajamani, 'The Right to Environmental Protection in India: Many a Slip between the Cup and the Lip?', 16:3 *Review of European Community and International Environmental Law* (2007), 274, at 278–279.

²² The Constitution of India, Article 19(1)(a), found at: <<http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm>>.

²³ *State of Uttar Pradesh v. Raj Narain & Others* [1975] 4 SCC 428; *S.P. Gupta & Others v. President of India and Others* 1981 Supp SCC 87; *People's Union of Civil Liberties v. Union of India* [2004] 2 SCC 476.

²⁴ *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd. & others* [1988] 4 SCC 592; *Research Foundation for Science Technology and Natural Resources Policy v. Union of India (UOI) and Another* [2005] 13 SCC 186.

²⁵ K. Kohli, 'Govt Can't be Silent', *Civil Society Online* (May 2013), found at: <<http://www.civilsocietyonline.com/pages/Details.aspx?322>>.

of all concerned citizens in environmental issues, and effective access to judicial and administrative proceedings.²⁶

LOOKING AHEAD

Local communities and experts have been opposing the Nyamjang Chhu project (and several other hydro-power projects proposed in the same region),²⁷ arguing that it is likely to have a significant adverse impact on the region's fragile ecosystem, as well as on the distinctive cultural and social way of life of the indigenous communities residing there. At the time of writing this

case note, the appeal is still pending before the NGT for arguments and the final judgment of the merits.

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²⁶ Rio Declaration on Environment and Development, found in Report of the UN Conference on Environment and Development (UN Doc. A/CONF.151/26/Rev.1, Vol. I, 14 June 1992), Annex, Principle 10.

²⁷ J. Mazoomdar, 'A Damned Race for Power' (16 February 2013), found at: <<http://tehelka.com/a-damned-race-for-power/>>; N. Mitra, 'With Anti-dam Mantra on Lips, Tawang Monks Hit the Streets', *The Times of India* (7 March 2013), found at: <http://articles.timesofindia.indiatimes.com/2013-03-07/guwahati/37530866_1_anti-dam-hydel-projects-smrf>; S. Agarwal, 'CDM Application by the 780 MW Nyamjang Chhu Hydro Project of Tawang: Is this the Theatre of the Absurd?', *Dams Rivers & People* (April–June 2012), found at: <http://sandrp.in/comments_CDM_HEPs/CDM_for_780_MW_Nyamjang_Chhu_HEP_theatre_of_the_absurd.pdf>.