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Green Taxes in India: Examples and Challenges

Where the strategy of "command and control" fails, economic incentives and disincentives win. This theory undergirds "green taxes," also known as "eco-taxes." Green taxes refer to levies intended to promote ecologically sustainable activities by introducing economic incentives and/or disincentives. Green taxes are a kind of Pigovian tax[1] levied on goods and activities that adversely impact the environment and human health. On the one hand, they discourage the use or adoption of such goods and activities. On the other hand, they secure financial resources to compensate for the damage done to the environment. Thus, they serve dual purposes: deterring environmentally deleterious activities, while raising revenues to address the costs of remedying the environment. Green taxes are seen as an extension of the "polluter-pays" principle. They also ensure a steady flow of revenue to the government, which may be used to strengthen and support environmental management. Though there are divergent views on the efficacy of green taxes, there is little doubt that they have the potential to change industry practices over a period of time by ingraining ecologically sustainable patterns of behavior and promoting green and clean substitutes.

Green Taxes in India

Green taxes are especially significant in the Indian context, where the problem lies not as much in the absence of regulations but in their enforcement. In other words, there is no dearth of laws in India when it comes to emission control, waste management, raw materials procurement, and pollution control. However, little has been achieved over the last 20 to 30 years.[2] Industrialization has increased manyfold, and so has environmental degradation. While successive governments kept introducing legislation and policies for protecting the environment and regulating its interface with industry, the enforcement of these laws remained in a gray area, mostly because of a lack of financial resources and skilled manpower, as well as industry indifference. Most important, the laws failed to create the desired effect of deterrence. Thus, in India, green taxes may prove to be a boon.

Although India does not have an elaborate system of environmental taxes, certain older as well as more recent experiments merit review. Some taxes are imposed purely to augment resources of the enforcement agencies, while others are levied on environmentally deleterious activities and processes.

Water Cess

The "water cess"[3]—i.e., water tax—is one of the oldest environmental taxes in India. This tax is levied on local governmental authorities and industries under the provisions of the Water (Prevention and Control of Pollution) Cess Act of 1977 (Water Cess Act). The water cess is not aimed at discouraging any resource use; rather, it seeks to augment the resources of the central and state pollution control boards.

When the Water Cess Act was enacted in 1977, the state governments were not able to pump in adequate funds to state pollution control boards for the prevention and control of water pollution.[4] Thus, a mechanism was introduced for levying water taxes on industry and on the local authorities entrusted with the duty of supplying water based on the volume of water consumed. The water cess is collected by the state governments and is credited to the consolidated fund of India (CFI). Out of the total cess collected, 80% is reimbursed to state governments for further disbursement to pollution control boards. Today, the proceeds collected from water taxes are an essential source of revenue for the funding of the activities

1 Pigovian taxes attempt to make the private parties involved feel the social burden of their actions.

2 This period saw the enactment of many significant environmental laws, including the Water (Prevention and Abatement of Pollution) Act of 1972, the Environment Protection Act of 1986, and various other acts and rules.

3 "Cess" is a term used in Indian English to mean tax.

4 The statement of objects and reasons of the Water Cess Act states, " . . . due to pressure on limited resources, the state governments are not able to provide adequate funds to the state boards for their effective functioning."

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The goal of this service from the Environmental Law Institute (ELI) is to report on these developments and analyze their implications. The *Update* will also identify and analyze potential future developments for readers, so that they have advanced warning of risks and opportunities. The service will cover environmental legal and policy developments at the national and state level regarding climate and energy policy, manufacturing, importation and exportation, natural resources, product safety, worker safety, and other major environmental issues, such as water quality and supply.

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of pollution control boards. Major cess-collecting states include Uttar Pradesh, Andhra Pradesh, Maharashtra, and Rajasthan. Cess collections are lower in states less dependent on industry, such as Meghalaya and Assam.[5]

Nonetheless, the method of collecting and disbursing water taxes is not without its flaws. The rates of water cess are very low in most states. Further, it involves a cumbersome and time-consuming procedure. Industries must submit monthly reports or "returns" with the pollution control board regarding the water they consumed, and the pollution control board raises the water cess bill based on the water consumed by the industry concerned. If the industry fails to furnish the return with the pollution control boards, the board will make inquiries into the proper amount of cess to be paid. In most cases, industries do not furnish the return on time. And even if they do submit the report on time, the pollution control boards may fail to raise the bill for water taxes in a timely manner. The disbursement of taxes collected and the states' use of these funds is also an issue. Currently, about US$60 million remains with the CFI as an outstanding balance payable to the states.[6]

Clean Energy Cess

A clean energy cess on coal, lignite, and peat was introduced by the Government of India in June 2010 under the provisions of the Clean Energy Cess Rules of 2010 (Energy Cess Rules). Last year, the 2010-2011 budget stipulated the creation of a National Clean Energy Fund (NCEF) for financing innovative projects and schemes in clean energy technologies. The government approved the formation of the NCEF earlier this year. Subsequent to the budget announcement, the Energy Cess Rules took effect on June 22, 2010, providing a mechanism for the collection of energy taxes. Under the Energy Cess Rules, a clean energy cess of 50 Indian rupees (approximately US$1) per metric ton of coal, lignite, and peat is levied on imported as well as indigenously produced coal.

Between the establishment of the Energy Cess Rules and the formation of the NCEF, the central government collected around 31.24 billion Indian rupees (approximately US$640 million) from the energy cess in 2010-2011. Revenue is expected to exceed 65 billion Indian rupees (approximately US$1.3 billion) in the 2011-2012 year.[7]

Global Green Taxes

Many developed countries, including Finland, Germany, the Netherlands, Portugal, Spain, and the United States, have introduced green taxes in some form. Germany has imposed taxes on electricity and petroleum. Finland, the Netherlands, Portugal, and Spain have introduced differentiations into their car registration taxes to encourage car buyers to opt for the cleanest car models. Similarly, in the United States, at the federal level, a "gas guzzler" tax is imposed on new cars that exceed fuel-efficiency standards. There also exist taxes on ozone-depleting substances and fertilizers and pesticides used in agriculture.*

* Tax Policy Center, *Taxes and the Enviornment: What Green Taxes Does the United States Impose?,* http://www.taxpolicycenter.org/briefing-book/key-elements/environment/usa.cfm (last updated July 31, 2007).

The money will be split equally among three projects over the next five years: protecting forests; incentivizing the generation of grid electricity from renewable energy sources; and encouraging the maintenance of irrigation networks and an independent regulatory mechanism for the water sector.[8]

Taxes on the extraction or use of coal, crude oil, and other conventional energy sources are common worldwide. In India, where the coal resources are quickly depleting, the energy cess is welcome. However, considering the rate of the energy cess and the overall placement of coal in India's energy consumption pattern, the tax may not instantly impact the demand-supply chain. Still, it will ensure that the government has resources for research and development for cleaner substitutes and technologies.

Green Tax on Polluting Vehicles

The state of Himachal Pradesh recently introduced another type of green tax that was soon replicated by other Indian states. In 2008, the Himachal Pradesh government imposed a green tax on tourist vehicles entering the district of Manali. Recently, the Municipal Corporation of Shimla, another district in the state, decided to do the same. This tax is imposed to support the environment and help improve the local economy. The tax collected will go into an environmental fund that will be used to implement steps toward making the state carbon-neutral.[9]

A similar tax on vehicles has also been introduced in the states of Andhra Pradesh, Bihar, Karnataka, and, recently, Maharashtra. In most states, the green tax is levied on old and polluting vehicles, thereby encouraging

5 Press Information Bureau, Government of India, *Collection of Water Cess* (Aug. 29, 2011), http://www.pib.nic.in/newsite/erelease.aspx?relid=75243.

6 *Id.*

7 *Union Cabinet Clears Creation of National Clean Energy Fund*, Econ. Times, Apr. 7, 2011, http://articles.economictimes.indiatimes.com/2011-04-07/news/29392656_1_national-water-mission-water-resources-clean-energy.

8 Priscilla Jebaraj, *Coal Cess to Pay for Clean Energy Fund*, The Hindu, Feb. 26, 2010, http://www.thehindu.com/business/article114289.ece.

9 Information & Public Relations, Government of Himachal Pradesh, *Path Breaking Initiatives for Environment Conservation* (Feb. 13, 2011), http://himachalpr.gov.in/features/Feature-06E11.htm.

people to scrap older vehicles. However, India has yet to develop a comprehensive policy on the use and scrapping of old motor vehicles.

Net Present Value of Forestland

The net present value (NPV) of forestland, while not strictly a tax, is paid by user agencies, i.e., project proponents, who wish to divert forests for non-forestry purposes. It is an innovative way of augmenting the government's resources and making user agencies causing deforestation pay for the loss of valuable forests. Interestingly, NPV is paid by the user agencies over and above their usual contribution toward compensatory afforestation, mandated under the Forest Conservation Act of 1980. NPV paid by user agencies is intended to be used in restoring the benefits that are lost by such diversion.

The Supreme Court of India, while considering the issue of the nonutilization of funds collected by states for compensatory afforestation,[10] ushered in the idea of imposing NPV on the project proponents and user agencies seeking the diversion of forestland for non-forest use. While recognizing the importance of forests in sustaining life, the court attempted to address several questions, the most important among them was devising a method for assessing the compensation for the diversion of forestland in light of the consequential loss of benefits accruing from the forests. The Supreme Court order defined NPV as "the present value (PV) of net cash flow from a project, discounted by the cost of capital." The value of NPV to be recovered, then, was determined at the rate of 500,000 Indian rupees (US$10,870) to 920,000 Indian rupees (US$20,000) per hectare of forestland, depending on the quantity and density of the land in question.[11]

The Court ordered the funds recovered from NPV to be diverted to the Compensatory Afforestation Fund (CAF), which is managed at the federal and state levels by the Compensatory Afforestation Fund Management and Planning Authorities. These authorities are responsible for the judicious, transparent, and efficient management, disbursement, and utilization of these funds. In addition to NPV, the CAF also deals with all funds from user agencies given toward compensatory afforestation, catchment area treatment, or the compliance of any other conditions stipulated by the central government. The funds received for compensatory afforestation must be used as per the site-specific schemes received from the states, while the money received toward NPV must be used for forest management, wildlife protection, and the supplying of wood and other forest produce, among other things.

The funds collected by the CAF are enormous. By June 30, 2009, almost 99.32 billion Indian rupees (approximately US$2 billion) had been collected by the central government's Compensatory Afforestation Fund Management and Planning Authority.

The Way Ahead

The NPV and the water, energy, and vehicle taxes present four innovative forms of eco-taxes in India. Many others are also under consideration, such as a tax on the manufacture of plastic bags and bottles and a tax on groundwater extraction. With rising pressure on depleting natural resources, green taxes are slowly emerging and will surely expand to other sectors and industries.

However, there are various concerns that the government must address before a more robust regime for green taxes is established in India. Green taxes may hurt small investors or industries. They may also fail to have a deterrent effect on large industries. For example, industry may, over time, pass the increased costs stemming from the imposition of taxes onto consumers. In such instances, green taxes are merely a source of additional revenues for the government and will fail to meet their objective unless utilized in an efficient and transparent manner. Thus, the structuring of taxes is very critical. Along with a tax regime, the government should also introduce incentives and subsidies for the adoption of cleaner technologies and processes and the use of environmentally friendly raw materials.

Further, there should be a clear connection between the premise for the collection and use of green taxes. If taxes are levied on harmful emissions, the proceeds from such taxes should ideally be used for air quality monitoring and pollution control. The taxpayers should appreciate and understand why an additional obligation is imposed on them and how their money is going to be used. The choice of authority responsible for the collection and management of taxes is also critical. The government must choose from control or autonomy—spoon-feeding or independent decisionmaking.

In short, collection, management, utilization, and enforcement are the four keys to an efficient green tax regime, and the government should work on developing these carefully.

10 Supreme Court order dated Sept. 29, 2005, in T.N. Godavarman v. Union (Writ Petition (Civil) of 202/1995).

11 *Id.*

Hazardous Substance Regulations: A Careless Attempt at Harmony

The Draft Hazardous Substances (Classification, Packaging and Labeling) Rules of 2011 (Draft Rules) attempt to harmonize Indian laws with globally accepted norms and standards for the transportation of dangerous goods. Issued by the Ministry of Environment & Forests (MoEF) in July, the Draft Rules are intended to regulate and harmonize the classification, packaging, and labeling of hazardous substances and are largely based on the United Nations Model Regulation on the Transport of Dangerous Goods of 2009 (UN Model Regulations). However, as they are in draft form, the Draft Rules will only come into force once they have been notified in the official gazette, pursuant to finalization of the draft rules by the MoEF, with or without modifications.

The term "dangerous goods" includes not only radioactive, toxic, and flammable substances, but also commonly traded products, such as paints, perfumes, deodorants, and printing inks. In India, there is already a wide array of laws that bear on the classification or trade in dangerous goods. These laws are either based on the mode of transportation by which the goods are transported, e.g., air, water, and surface, or are based upon the category of goods, e.g., hazardous chemicals, wastes, electronic waste, insecticides, and radioactive materials.

This multiplicity of laws and regulations not only leads to a lack of a sound and comprehensive definition of dangerous goods, but also results in conflicting regulatory requirements that industries find difficult to follow. Another challenge for industry is the disparity between Indian laws and international regulations on the transportation of dangerous goods. All over the world, there is an increased emphasis on the adoption and use of globally harmonized systems for the classification and labeling of dangerous goods. The Technical Instructions Addendum[1] issued by the International Civil Aviation Organization (ICAO), the International Maritime Dangerous Goods (IMDG) Code, and the UN Model Regulations seek to attain such harmonization. The current Draft Rules are largely based on the latter regulations.

Existing Indian Regulations on the Transportation of Dangerous Goods

While there are Indian laws and regulations that conform to international laws on the transportation of dangerous goods, the Indian regulatory framework lacks congruence in two ways: between domestic laws and international regulations; and between dangerous goods transportation laws and other domestic laws.

As mentioned above, there are laws that govern the transboundary movement of dangerous goods by land, air, or sea. Such laws also incorporate requirements provided under international regulations. The provisions of the IMDG Code are incorporated into the Merchant Shipping (Carriage of Cargo) Rules of 1995, for example. The Aircraft (Carriage of Dangerous Goods) Rules of 2003 integrate classification and labeling requirements under the ICAO Technical Instructions Addendum.

However, these laws practically exist in isolation, regardless of how different dangerous goods are treated under other Indian laws. For example, the import, transport, packaging, and labeling of pesticides is governed by the Insecticides Act of 1968. Yet the Aircraft (Carriage of Dangerous Goods) Rules of 2003, which regulate the transportation of dangerous goods by air and stipulate labeling and packaging requirements, do not make any reference whatsoever to such domestic laws. As a result, multiple requirements may have to be compiled for the labeling and packaging of dangerous goods falling within the purview of these discrete laws.

Similarly, the Motor Vehicles Act of 1988, which deals with the surface transportation of dangerous goods, does not conform to laws dealing with the transboundary movement of such goods. As a consequence, "dangerous goods," for the purposes of transportation under the Merchant Shipping (Carriage of Cargo) Rules of 1995, may not be "dangerous goods" under the Motor Vehicles Act of 1988. Although these incongruous classifications may be explained by the existence of different and peculiar transportation requirements, inconsistent labeling and packaging requirements under different laws lead to a confusing situation.

The Draft Hazardous Substances Rules

The current Draft Rules are aimed at bringing harmony to these regulations and alleviating confusion in the domestic and international transportation of dangerous goods. The Draft Rules list more than 4,000 goods or substances intended to be regulated as dangerous goods. Thus, there is no room for any assumptions or ambiguities in the identification of dangerous goods to be regulated. The list includes hazardous chemicals (as listed under the Manufacture, Storage, and Import of Hazardous Chemicals Rules of 1989) and hazardous substances based

1 Technical Instructions Addendum, 2007-2008 edition.

on the UN Model Regulations. The list of hazardous substances includes bulk chemicals, genetically modified organisms, radioactive or explosive substances, and finished goods, such as printing inks, adhesives, coating solutions, batteries, and paints.

Notably, the existing regulations dealing with hazardous substances or goods—such as the Manufacture, Storage, and Import of Hazardous Chemicals Rules of 1989 or the Central Motor Vehicles Rules of 1989—not only provide a specific list of substances or goods to be regulated, but also prescribe indicative criteria for determining whether any substance (not specifically listed) is, for example, flammable, toxic, or corrosive. However, the absence of any guidance on what tests should be performed or how to apply the indicative criteria often leads to ambiguous interpretation.

Under the Draft Rules, there are no tests to be performed or any standards to be satisfied to ascertain whether any substance is dangerous. The tests for flammability, toxicity, explosiveness, and corrosiveness, as stipulated under the Draft Rules, are only for the purpose of classifying the already-listed dangerous goods into the globally accepted nine hazard classes.[2]

The classification of dangerous goods, instructions, and packaging groups are mainly based on the UN Model Regulations, except that some of the goods listed as dangerous under the UN Model Regulations are not listed under the Draft Rules. Thus, industry would have to comply with a uniform set of packaging and labeling regulations with regard to their transboundary movement.

Nonetheless, the Draft Rules raise serious concerns as to their scope, application, and relationship with other pieces of legislation. There is no clarity on the scope and application of the Draft Rules. It is not specified whether they apply to transboundary movement, domestic transportation, on-site storage, or all of these. For a person manufacturing an article designated as a dangerous good under the Draft Rules, it is not clear whether the regulated article should be packaged or labeled in terms of the rules when it is being exported out of India, or also when it is being transported within India. At various places, the Draft Rules use the terms "hazardous chemicals" and "hazardous substances" interchangeably, thus adding to the existing ambiguity on whether only chemicals are required to be regulated or all dangerous goods. Further, there is no clarity on how the Draft Rules would work vis-à-vis the other existing regulations on the packaging or labeling of dangerous goods. For example, if the goods are required to be transported by air, would the consignor be required to comply with both the Draft Rules and the Aircraft (Carriage of Dangerous Goods) Rules of 2003? Or would compliance with the Draft Rules be sufficient?

In addition, the Draft Rules fail to incorporate some of the vital exemptions and exclusions provided for in the UN Model Regulations and in various other internal regulations. For example, the Draft Rules do not include exemptions for non-bulk packaging, i.e., less than 119 gallons, under U.S. Department of Transportation hazardous materials regulations. Nor do they exempt flammable chemicals that have passed a suitable sustained-combustion test. As a result, certain liquids that are not regulated as flammable in other jurisdictions would be regulated as flammable or even highly flammable in India. This would lead to ambiguities and procedural difficulties with regard to importation, transportation, and labeling requirements.

The Draft Rules thus present a peculiar situation: the MoEF is working toward the larger objective of global harmonization, but it is oblivious to the various incongruities of domestic laws. Any attempt to achieve harmonization with international practices should be made only after assessing its compatibility with the existing domestic laws. The Draft Rules are far from attaining complete harmony with international laws. Most important, harmony cannot be achieved in the absence of a clear purpose. A bare reading of the Draft Rules suggests that the rulemakers were neither clear about the need for the Draft Rules nor considerate of their impact on other existing legislation. The ambiguity in scope, coupled with mindless insertion of provisions from the UN Model Regulations, thus raises doubts on the fate of the Draft Rules. The Draft Rules, if enforced in their present form, would surely join the ranks of those numerous existing regulations that are in contradiction with each other and that exist and operate in isolation.

2 The nine classes are: (1) explosives; (2) gases; (3) flammable liquids; (4) flammable solids susceptible to spontaneous combustion or substances that emit flammable gases upon contact with water; (5) oxidizing substances or organic peroxides; (6) toxic and infectious substances; (7) radioactive materials; (8) corrosive substances; and (9) miscellaneous dangerous substances or articles.

Proposed Rules and Regulations

Draft Biomedical Waste (Management and Handling) Rules of 2011

The Ministry of Environment and Forests (MoEF) has issued the Draft Biomedical Waste Rules (Draft BMW Rules) of 2011,[1] which, upon coming into force, would supersede the existing Biomedical Waste (Management and Handling) Rules of 1989. The Draft BMW Rules are substantially similar to the existing rules, but they contain certain distinct and significant features that are expected to streamline the biomedical waste disposal mechanism in India.

Most important, the Draft BMW Rules require every clinical establishment to obtain prior authorization from a pollution control board before disposing of waste. This category includes hospitals, nursing homes, clinics, dispensaries, pathological laboratories, and blood banks, as well as biomedical waste treatment facilities.

Under the existing rules, the requirement for prior authorization was limited to those institutions that provide treatment or service to more than 1,000 patients. But the number of clinical facilities is growing in every city. Each generates large volumes of highly infectious and toxic biomedical waste. Because of the absence of a mandatory authorization requirement, it is extremely difficult for enforcement agencies to ensure that these institutions treat and dispose of biomedical waste in a safe and environmentally friendly manner.

The Draft BMW Rules generally set out extended responsibilities for the occupiers of clinical institutions and establishments. These responsibilities include protecting the health and safety of the workers involved in the handling of biomedical waste. Clinical facilities will be required to provide their workers with immunizations, appropriate training, and regular health check-ups.

The Draft BMW Rules also incorporate the "polluter-pays" principle by making clinical occupiers and operators liable for all damages to the environment or human health due to the improper handling or disposal of biomedical waste. Occupiers and operators will also be liable under the penal provisions of the Environment Protection Act of 1986.

The Goa Land Conservation and Management Bill of 2011

The state government of Goa recently introduced the Draft Goa Land Conservation and Management Bill of 2011 (Draft Land Conservation Bill) to the Legislative Assembly. This bill is intended to provide for the conservation of agricultural land and the prevention of the sale of agricultural land for nonagricultural purposes. It introduces strict conditions on the conversion or acquisition of agricultural land in Goa. The Draft Land Conservation Bill seeks to protect agricultural land from compulsory acquisition by state government authorities, as well as from people who are mainly engaged in nonagricultural activities.

If the Draft Land Conservation Bill comes into force in its present form, state government authorities would not be able to compel the use of any agricultural land for nonagricultural purposes or to fill up, divert, or close a water body without the prior approval of the Goan Legislative Assembly. Similarly, individuals or families with an assured annual income of 1.2 million rupees or more from sources other than agricultural lands will not be permitted to acquire any agricultural land, whether as an owner, landlord, tenant, or mortgagee with possession. Every acquisition of land in contravention of these rules, and not by way of inheritance or bequest, will be declared invalid, and the land will be transferred to the state government. The bill further stipulates restrictions on, among others, standards of cultivation, contract farming, and the possession of agricultural land by nonagriculturalists.

The Draft Land Conservation Bill imposes strong restrictions on the diversion of agricultural land to nonagricultural purposes or to nonagriculturists. It affirms that extreme measures should be taken to deal with extreme situations. To preserve and maintain land use in ecologically critical areas, it is preferable to restrict all activities that divert the land from its primary use than to provide an easily corruptible set of permitted, restricted, and prohibited activities. The bill also provides an example that the national MoEF should consider when regulating such critical areas.

1 S.O. No. 1955, Aug. 24, 2011.

News

Supreme Court Permits the Export of Endosulfan

The Supreme Court of India has recently permitted the export of nearly 1,100 metric tons of endosulfan. However, the Supreme Court's May 13, 2011, moratorium on the manufacture, sale, and use of endosulfan was retained.[2] The exports are also subject to environmental, health, and safety conditions.

The Court observed that from the accumulated quantity of endosulfan stocked with manufacturers, around 1,100 metric tons can be exported to countries from where orders have already been received. This was purportedly approved to help the manufacturers meet their contractual obligations.

UN Certifies Carbon Credits for Delhi Metro

The Delhi Metro Rail Corporation (DMRC) was certified by the United Nations (UN) as the first metro rail and rail-based system in the world that will receive carbon credits for reducing greenhouse gas emissions. The metro rail system has helped reduce pollution levels in the city by 630,000 tons every year, thus curbing climate change.

No other metro rail system in the world received carbon credits because of the stringent requirements regarding the submission of conclusive documentary proof of reduction in emissions. This is the second Clean Development Mechanism (CDM) project from the DMRC to be registered with the UN, after its first CDM project on regenerative braking.

2 *See Is It the End of Endosulfan in India?*, India Update, July-Sept. 2011, at 8-9.