

# How Much Should the Polluter Pay? Indian Courts and the Valuation of Environmental Damage

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# Overview

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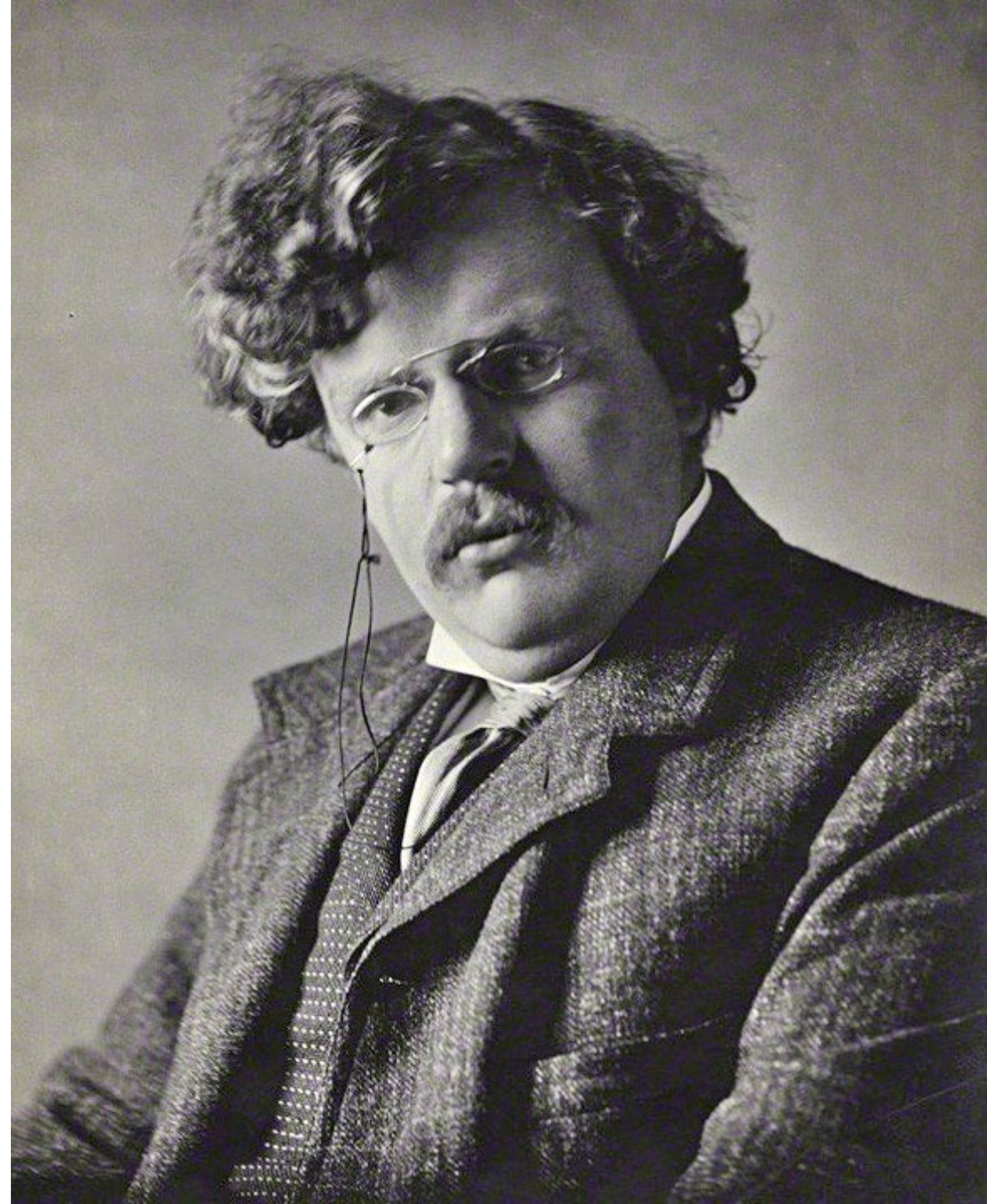
- Environmental valuation
- PPP in treaties and statutes
- PPP in Indian case law
- How much should the polluter pay?
  - Scope
  - Methodology
  - Evaluation





What is the usual charge for seeing the clouds shattered by the sun? What is the market price of a tree blue on the sky-line?

— G K Chesterton,  
'A Cab Ride across  
Country' (1909)





BEF 254,702 (1987)



SEK 20,000 per  
wolverine (1995)



USD 19 (approx, 1997)

What valuation method shall we use?

What values do we want to measure?



# Framework and context

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- Valuation framework
  - Step zero
  - Scope
  - Methodology
- Context-driven valuation

# The principle

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The **costs** of environmental pollution should be borne by **those** whose activities were responsible for causing the pollution.

— Sunkin, Ong & Wight, *Sourcebook on Environmental Law* (2002)



# Ambiguity

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The apparent simplicity of the PPP masks a number of ambiguities and its outlines continue to be poorly defined at the legal level.

—de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (2002)

There has been considerable discussion of the nature of the polluter pays principle, but the precise scope of the principle and its implications for those involved in ... polluting activities have never been satisfactory agreed. —*Indian Council for Enviro-Legal Action v UoI* (1996)

The courts have an essential role to fulfil in clarifying the status and the scope of the principle. —Bleeker, 'Does the Polluter Pay? The Polluter-Pays Principle in the Case Law of the European Court of Justice' (2009)

# Treaties and legislation

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The polluter should bear the expenses of pollution prevention and control measures. — OECD 1972 Recommendation

National authorities should endeavour to promote the internalization of environmental costs ... taking into account the approach that the polluter should, in principle, bear the cost of pollution — Principle 16, Rio Declaration (1992)

The Tribunal shall, while passing any order or decision or award, apply the principles of sustainable development, the precautionary principle and the polluter pays principle. — The National Green Tribunal Act (2010), section 20

# Case law

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- *MC Mehta v Union of India (Oleum case, 1987)*:  
absolute liability
- *Indian Council for Enviro-Legal Action v UoI (1996)*:  
“almost universal recognition”
- *Vellore Citizens Welfare Forum v UoI (1996)*:  
“part of the law of the land”

# Scope

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- Environmental restoration costs
- Compensation to human victims
- To **compensate** for the harm caused ... to villagers ... and also to defray the cost of the remedial measures required to **restore** the soil and the underground water sources (*Enviro-Legal Action*)
- Polluter is liable to pay the cost to the **individual** sufferers as well as the cost of reversing the damaged **ecology** (*Vellore*)

# Justifications

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- Corrective justice:  
The polluter, is under an **obligation to make good** the damage caused to the environment (*MC Mehta v Kamal Nath*, 1997)
- Deterrence:  
Restitution plus exemplary damages “so that it may **act as a deterrent** for others not to cause pollution in any manner” (*MC Mehta v Kamal Nath*, 2002)
- Internalising the externality?

# Approach 1: Delegation

## Vellore

- Central Government to constitute an authority under the Environment Act
- Compute damages to restore ecology and compensate individuals
- Implement the polluter pays principle
- Procedural matters:
  - Composition of the committee
  - Fair hearing
  - Environment Protection Fund



"Delegating? Don't we have people for that?"

# Delegation: Analysis

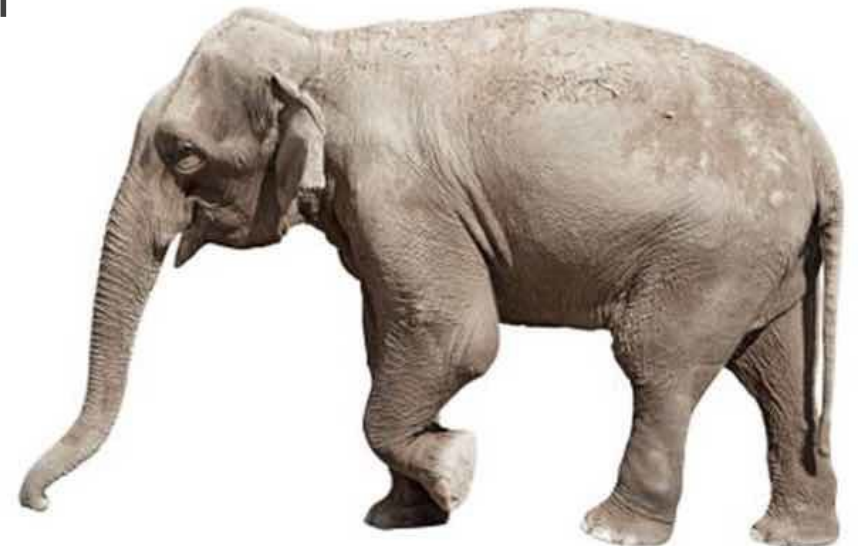
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- More detailed terms of reference
- Environmental restoration:
  - Interim and irreversible losses
- Individual compensation:
  - Provisioning services (Millennium Ecosystem Assessment)
  - Cultural services (spiritual, aesthetic, recreational, tourism)
  - Regulating services (air and water quality, erosion, climate change, extreme weather)

# Approach 2: Magnitude and capacity

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- *Oleum* case: The measure of compensation must be co-related to the **magnitude and capacity** of the enterprise because such compensation must have a **deterrent effect**.
- *Deepak Nitrite v State of Gujarat* (2004):
  - “Practical, simple and easy in application”
  - 1% of annual turnover
  - Magnitude and capacity, but also harm
- *Forward Foundation v Karnataka* (2015):
  - 5% of project cost in the first instance
  - Additional restoration costs





# Magnitude and capacity: Analysis

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- Determining magnitude and capacity (turnover, project cost, market share, market capitalisation...)
- Risk of arbitrariness
- Deterrence vs restoration
- Over-deterrence?

# Approach 3: Unexplained

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The quantum of exemplary damages ... does not give any accounting or any detailed application of mind ... and, therefore, it raises a doubt about the reasonableness of such amount.

—CM Jariwala, *Environmental Justice* (2004),  
on *MC Mehta v Kamal Nath* (2002)



# Unexplained: Analysis

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- Transparency
- Proportionality
- Arbitrariness
- Appeal
- Precedent value
- Legal development

# Conclusion

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- Environmental valuation
- PPP in treaties, statutes and case law
- How much should the polluter pay?
  - Scope
  - Methodology (3 approaches)
  - Evaluation
- Future research:
  - Expert reports