



NATIONAL LAW SCHOOL
OF INDIA UNIVERSITY

BENGALURU

HUMAN RIGHTS
LAWYERING CLINIC

Under the Surface

HUMAN RIGHTS AND
ENVIRONMENTAL IMPLICATIONS
OF THE PROPOSED SIJIMALI
BAUXITE MINE IN ODISHA

April 2024

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UNDER THE SURFACE

Human Rights and Environmental Implications of
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National Law School of India University, Bangalore

APRIL 2024

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Foreword

The National Law School of India University Bangalore was established in 1989 to make an enduring contribution to social and economic development in India. The University pioneered new academic pedagogies to transform legal education and emphasized experiential learning to be at the core of student learning. By encouraging students to step out of the classroom and engage directly with underserved communities in need, we revitalize our understanding of the law and its work in the wider world.

As an undergraduate student at the University, I had the opportunity to be a part of a student team that engaged in a year long community based law reform project that examined large scale industrialization in the Dakshina Kannada district in the State of Karnataka. This project forced the student team to shy away from easy sloganeering around development debates and develop an empathetic, yet academically rigorous multidisciplinary approach to respond to complex polycentric development problems. This early exposure to community based work shaped my understanding of the relationship between our social world and disciplinary knowledge.

In ‘My Pedagogic Creed’ [The School Journal, Volume LIV, Number 3 (January 16, 1897) pp 77-80] John Dewey boldly proclaimed that ‘I believe that all education proceeds by the participation of the individual in the social consciousness of the race...I believe that the only true education comes through the stimulation of the child's powers by the demands of the social situations in which he finds himself...I believe that this educational process has two sides-one psychological and one sociological; and that neither can be subordinated to the other or neglected without evil results following.’ While Dewey was concerned primarily with school education for young children, these proclamations help us understand why a community based legal education can shape student lives in a profound manner.

Three decades later, I’m glad to write a foreword to this Report, ‘Under the Surface: Human Rights and Environmental Implications of the Proposed Sijimali Bauxite Mine in Odisha’ as it brings together the findings of a young student group, led by Assistant Professor Radhika Chitkara, as they attempt to understand the effects of a large mining project on communities based in Odisha. I congratulate this group for the intensity of their efforts and the clarity of their

presentation in this Report. If anything, the questions asked and options explored are of more pressing urgency today, as our awareness of the climate crisis is more tangible and immediate. Our University remains committed to developing progressive and innovative responses to the grand challenges of our time, and we invite you to read this Report as a committed attempt to do so.

Prof (Dr) Sudhir Krishnaswamy,

Vice Chancellor

National Law School of India University, Bangalore

Preface and Acknowledgements

This report is the culmination of a six-month long clinical workshop on human rights lawyering held at the National Law School of India University, Bangalore from November 2023 to April 2024 with students from the BALLB(Hons.), LLB(Hons.) and LLM programmes. The clinical workshop was conducted in two parts: first from November to January as an elective offered to twenty six students, and from February to April on a voluntary basis by a group of eight students from the original twenty six. Over this six-month period, students underwent a rigorous training process with instruction on critical theoretical and praxis-oriented perspectives on human rights lawyering, guest lectures on environmental law and navigating the Parivesh website, as well as an intense writing workshop, to equip them to undertake the current clinical intervention.

The clinical workshop emerges from the rich traditions of lawyering as part of various human rights movements in India, particularly from the 1980s onwards, which seek to mobilize legal redress and representation in cases of human rights violations within a frequently hostile legal system. My attempt here was to encourage critical student engagement with the Law and legal system beyond normative and doctrinal debates, into the conduct of State institutions and State power; to reveal polyvocal sites for the practise of Law, one that decenters Courts and brings into focus executive bodies and democratic processes. This necessarily involved an orientation to lawyering strategies apart from litigation, such as the task of identifying violations through fact-finding, documentation and other forms of primary research; seeking redress through judicial, executive, NRHIs, and democratic avenues; advocacy etc. In a context where law universities in India have forever been alive to the need for clinical education for students but continues to struggle with sustainable models, the current intervention is a modest contribution to the field.

As such, this is a collective effort that has benefitted from the painstaking and meticulous effort of a multitude of people. In the first phase of the workshop, credit for primary research, documentation, analysis and drafting is due to Aditi Pophare, Advait Anand, Akash Ganapathy, Arjun Harihar, Atharva Patvardhan, Bhumika K., Bhushan Chatap, Dipul Yadav, Harshika G, Hemant Sangwan, Ishaan Goel, Karsh Sheroff, Kartik Gupta, Madhav Aggarwal, Maximillian Bell,

Panchami Manjunatha, Prajjwal Rathore, Prakhar Saunakiya, Pravesh Bansod, Reet Choudhary, Sakshith BN, Satyarth Srivastava, Shreya Mittal, Shristy Chhaparia, Syed Inamdar and Veratta Namshum.

The second phase of the workshop was staffed by a diligent team of Aditi Pophare, Advait Anand, Harshika G., Hemant Sangwan, Ishaan Goel, Panchami Manjunatha, Prajjwal Rathore and Shristy Chhaparia. This second leg involved additional research and fact-checking, drafting, editing, internal and external review, proof-reading, layout and finalization of the report for release. Credit is also due to this team of eight to see this exercise to the end, through logistical support and advocacy after completion of the report.

We are immensely grateful to Stella James and Shalini Gera for taking time out and sharing their expertise on environmental law and the Parivesh website through guest lectures with our students to build their skills for this exercise.

We are also indebted to our external reviewers Shomona Khanna, Ranjana Padhi and Shalini Gera for their painstaking review and feedback on our report, helping us to elevate our work to a higher level of insight and accuracy.

Thanks are also due to Prof. (Dr.) Sudhir Krishnaswamy (Vice-Chancellor of NLSIU), Prof. Kamala Sankaran and Prof. Darshana Mitra at NLSIU Bangalore for being the wind beneath our wings in this ambitious exercise.

Saving the best for last, the biggest salutes are due to the people of Sijimali, human rights defenders, lawyers, allies and all those engaged in a relentless struggle to save the Sijimali hills from permanent ecological destruction.

Prof. Radhika Chitkara

Instructor, Clinical Workshop on Human Rights Lawyering

Assistant Professor (Law), NLSIU Bangalore

Index of Abbreviations

Abbreviation	Meaning
ARR	Administrator for Rehabilitation and Resettlement
CA	Compensatory Afforestation
CBWTF	Common Biomedical Waste Treatment Facility
CMP	Conservation Management Plan
CNTA	Chota Nagpur Tenancy Act 1908
CSR	Corporate Social Responsibility
CTE	Consent to Establish
CTO	Consent to Operate
DMF	District Mineral Foundation
EC	Environmental Clearance
EAC	Environmental Assessment Committee
EIA	Environmental Impact Assessment
EMP	Environmental Management Plan
ESE	East-South-East
ESZs	Eco-Sensitive Zones
EU	European Union
FC	Forest Clearance
FCA	Forest Conservation Act 1980
FIR	First Information Report
FPIC	Free, Prior and Informed Consent
FRA	Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006
ha	Hectares
HEMM	Heavy Earth-Moving Machines

ICESCR	International Covenant on Economic, Social and Cultural Rights 1976
ILO	International Labour Organization
IPC	Indian Penal Code 1860
IUCN	International Union for Conservation of Nature
KLD	Kiloliters per Day
L&T	Larsen & Toubro
LARR	Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013
MOEFCC	Ministry of Environment Forest & Climate Change
MMDR	Mines and Minerals (Development and Regulation) Act 1957
MSIHC	Manufacture, Storage, and Import of Hazardous Chemicals Rules 1989
MTPA	Million Tonnes Per Annum
NBWL	National Board for Wild Life
NOC	No Objection Certificate
NNE	North-North-East
NW	North-West
OECD	Organisation for Economic Co-operation and Development
Orissa Regulation of 1956	Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation of 1956
OSPCB	Odisha State Pollution Control Board
OTFD	Other Traditional Forest Dwellers
PESA	Panchayat (Extension to Scheduled Areas) Act 1996
PM	Particulate Matter
PMCP	Progressive Mine Closure Plan
PHC	Primary Healthcare Centre

PARIVESH	Pro Active Responsive facilitation by Interactive and Virtuous Environmental Single window Hub
PSC	Project Screening Committee
PVTG	Particularly Vulnerable Tribal Groups
RF	Reserved Forest
RRS	Rehabilitation and Resettlement Scheme
SC	Scheduled Caste
SCNBWL	Standing Committee of National Board for Wild Life
SHC	Sub Health Centre
SIA	Social Impact Assessment
SPCB	State Pollution Control Board
SPTA	Santhal Pargana Tenancy Act 1949
SSE	South-South-East
ST	Scheduled Tribe
SW	South-West
SSW	South-South-West
TOR	Terms of Reference
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples, 2007
UNCLOS	United Nations Convention on the Law of the Sea, 1982
UNGP	United Nations Guiding Principles on Business and Human Rights
UAPA	Unlawful Activities (Prevention) Act, 1967
UDHR	Universal Declaration of Human Rights, 1948
WLPA	Wildlife Protection Act, 1972
WSW	West-South-West

Executive Summary

This report studies the environmental and human rights impact of the proposed Sijimali (locally known as Tijimali) bauxite mine in Rayagada (Kashipur) and Kalahandi (Thuamul-Rampur) districts of Odisha by M/S Vedanta Ltd. The project pertains to the extraction of 9 MTPA bauxite, setting up of two crushers of 1200 TPH capacity, 18 MTPA waste generation and top-soil removal over 1549 ha of forest, government, and private land. The lease period is fifty years, with the life period of the mine being thirty-one years.

Both Rayagada and Kalahandi are Scheduled Areas under the Fifth Schedule of the Constitution with a predominant *adivasi* population, comprising both dry and moist deciduous forests and grasslands, with rich floral and faunal biodiversity. Both areas have witnessed a decrease in forest cover over the past decade, primarily on account of mining. This report interrogates whether the proposed project complies with the human rights of affected communities and key principles of environmental governance, particularly the precautionary principle.

The report proceeds in two parts. Part A identifies the normative and legal framework governing large mining projects in India. This covers the human, fundamental and constitutional rights vested in the affected communities as well as the applicable principles of environmental governance. This part also delineates the processes under mining, environmental, forest, pollution, and other laws for approval of such projects, particularly under a radically reformed regulatory environment over the past five years. To do this, reliance has been placed on international and domestic legal instruments pertaining to rights and environment, particularly relating to Scheduled Tribes (‘ST’)/indigenous peoples/ *adivasis*. Among domestic instruments, the report draws from the Constitution, statutes, and various executive instruments such as Rules, Guidelines, Notifications, Circulars, and policies.

Part B analyses the claimed and potential impact of the proposed project on the people and the environment. This is undertaken through a meticulous scrutiny of all project-related documents available on the *Parivesh* website of the Ministry of Environment, Forests and Climate Change (‘MoEFCC’) submitted either by the proponent itself or by consultants hired by it. These include: the project proposal, the draft Environmental Impact Assessment (EIA) report, the Environment and

Conservation Management Plans. The claims in these project-related documents are then triangulated against reports and deliberations of state authorities involved in the clearance processes, specifically the Environmental Assessment Committee ('EAC') and the Project Screening Committee ('PSC'), as well as representations and objections raised by affected communities at various forums such as public hearings, news media, petitions etc. Lastly, this Part also undertakes secondary research on the impact of bauxite mining generally, drawing from assessments of mining sites in other parts of the world. As the clearance process for the project is ongoing, our report covers documents only up to the period of 20 January 2024.

Structure of the Report

Chapter 1 studies the human, fundamental and constitutional rights of STs, *adivasis* and indigenous peoples, by whatever name referred, under domestic and international law. These are identified under the five core pillars of: (i) right to autonomy and self-governance, including the right to free, prior and informed consent ('FPIC'); (ii) right to land, forest and customary resources; (iii) religious and cultural rights; (iv) socio-economic rights; and (v) right to development and environment. Instruments such as the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP'), Fifth and Sixth Schedule of the Constitution, Panchayat (Extension to Scheduled Areas) Act, 1996 ('PESA'), Forest Rights Act, 2006 ('FRA') etc. are studied. The chapter identifies corresponding obligations on the State under various instruments, as well as on businesses under the UN Guiding Principles on Business and Human Rights. The chapter brings attention to the centrality of rights to land and autonomy to the attainment of all other fundamental and human rights of *adivasis* and indigenous peoples.

Chapter 2 identifies key principles of environmental governance in the pursuit of equitable and sustainable development, namely, the polluter pays principle, the public trust doctrine, and the precautionary principle. An attempt is made to identify the meaning and content of these principles, and the corresponding obligations they cast on state and non-state actors for environmental protection and biodiversity conservation. It brings particular attention to the trusteeship or custodian relationship in which the State holds natural resources for the people, and its primary obligation to prevent devastating environmental harms, particularly in the presence of scientific uncertainties.

Chapter 3 describes the statutory and executive framework governing approvals for mining projects in India, oriented as a chronological three-step process. Step 1 covers the exploration of minerals and grant of mining lease under the Mines and Minerals (Development and Regulation) Act ('MMDR'), which is undertaken wholly between state authorities and private actors with no participation of rightsholders and affected communities. Step 2 covers various statutory clearance processes pertaining to forests, environment, pollution, waste management etc. This includes the environmental clearance process under the EIA Notification 2006 (as updated following recent changes), forest clearance process under the Forest Conservation Act, 1980 ('FCA'), again updated to reflect changes brought in by Forest Conservation Rules and Guidelines in 2022, pollution clearances under the Air (Prevention & Control of Pollution) Act, 1981 ('Air Act'), Water (Prevention & Control of Pollution) Act, 1974 ('Water Act'), Hazardous Waste Management Rules, 2016 (as updated following recent changes), and finally the wildlife clearance process under the Wildlife Protection Act, 1972 ('WLPA') and Supreme Court judgments. Step 3 covers the final step by which land and forest rights are acquired by the state under the Land Acquisition, Rehabilitation, and Resettlement Act, 2013 ('LARR'). The Chapter concludes that the regulation of the mining industry and clearance processes vests an extremely high degree of quasi-legislative powers with the executive and does not ensure adequate protection to the right to land and autonomy, particularly FPIC, of rightsholders and affected communities.

Following the above description of the applicable normative, statutory, and executive standards, the report proceeds to analyse the proposed project.

Chapter 4 presents the profile and current status of the proposed project, based on a study of the project documents and other official sources. The chapter delves into the resource requirements of the project in terms of land and forest area, water and electricity requirements, and physical infrastructure for extraction, crushers, transportation, townships, and waste disposal. A mining project of this scale is extremely resource-intensive, particularly in terms of natural resource requirements placing heavy demands on land, forest and surface and ground water sources. Out of the area covered by the project, 699 ha comprise forest land as administratively classified, requiring 725 KLD water mostly drawn from groundwater sources.

Chapter 5 and 6 finally turns to the potential impact of the proposed project on the people and the environment, based on a scrutiny of project-related documents, reports of state authorities, representations by rightsholders, and secondary sources. Environmental impact is studied in terms of the impact on land and forests (focusing on scale of deforestation, loss of fertility and waste disposal), impact on wildlife, and on water. Human rights are studied in terms of impact on rights (land and forests, autonomy, FPIC, cultural rights), health and livelihood.

Findings and Recommendations

The report concentrates on the following **ten** findings in particular:

1. The legal framework governing mining projects and the proposed project, both violate land, autonomy and cultural rights of *adivasis* and other forest-dwelling communities under domestic and international law.
2. The legal framework governing mining projects and the proposed project, both violate the right to free, prior, and informed consent of affected communities under domestic and international law.
3. The proposed project will likely cause long-term irreversible and irreparable harm to forest and wildlife biodiversity and likely increase in human-animal conflict.
4. The proposed project will likely lead to depletion and contamination of surface and ground water sources in the region.
5. The draft EIA report under-reports the probable forced displacement and loss of livelihoods in the affected villages.
6. The draft EIA report egregiously distorts the health impact of the proposed mine on affected communities and workers.
7. The central and state governments have unlawfully abdicated their obligations with respect to the right to health of affected communities.
8. Certain state authorities are responsible for violating their obligations under the precautionary principle of environmental governance.
9. The project proponent and its associates have violated their obligations under the UN Guiding Principles through their conduct before and during the clearance processes.

10. The proposed project results in skewed distribution of costs on marginalized ST and OFTD communities, and benefits to the project proponent and the State.
-

Accordingly, we find that the proposed project not only violates the human and fundamental rights of *adivasis* and affected communities, even before the commencement of the project but continuing potentially throughout its lifecycle. It also violates the precautionary principle of environmental governance, as it has a high probability of resulting in long-term irreversible and irreparable environmental harm, all of which cannot be quantified, and has not been attempted to be quantified in the draft EIA report. This includes the permanent loss of endangered and vulnerable biodiversity in the region, identified as such both by the State and by the IUCN.

The project documents fail to view affected communities as empowered rightsholders under domestic and international law, with the right to autonomy, to FPIC, and to determine their own course of socio-economic and political development. Instead, the project documents reflect colonial stereotypes of affected communities as impoverished and undernourished populations, for whom the proposed project is necessary for health and livelihood. This entirely belies the large-scale destruction of land rights, health and livelihood that follows from similar mining projects.

The report concludes with recommendations to both State and civil-society actors, calling to uphold the rights to land, autonomy, FPIC, cultural beliefs and practices, as well as to health, livelihood, and development of affected communities in these Fifth Schedule areas. It calls for an immediate withdrawal of all criminal actions against individuals and leaders of affected communities in relation to the current project, and for the initiation of criminal and/or disciplinary action against state and non-state actors responsible for rights violations in Rayagada and Kalahandi since August 2023. Finally, it most urgently calls for independent scientific assessments by experts and civil society organizations through meticulous ground-truthing and fact-finding exercises to study the short-, medium- and long-term environmental and social impacts of the proposed project.



Introduction

This is a study concerning the human and environmental implications of the proposed Sijimali (locally known as Tijimali) bauxite mine in Rayagada and Kalahandi districts of Odisha [“the project”]. Specifically, this report studies the compliance of the proposed project with international and domestic norms relating to environmental governance and the human rights of *adivasis* and other affected communities. While the terms ‘indigenous peoples,’ ‘*adivasis*’ and Scheduled Tribes (STs) are frequently used interchangeably in legal literature, they are of diverse origin and scope. For the purposes of this report, we use the terms contextually, employing “indigenous peoples” in reference to international norms, STs in reference to domestic legal and administrative categories, and *adivasis* in other contexts to encompass the wider sociological category of peoples who may or may not be recognized as such under domestic law.

The project, proposed by M/S Vedanta Ltd. [“project proponent”], is for the mining of 9.00 MTPA (‘Million Tonnes Per Annum’) of bauxite, the ore for aluminum, across 1549 hectares (ha) of tropical to dry deciduous forests and grasslands in Kalahandi and Rayagada districts of south/ south-west Odisha. The lease has been granted for a period of fifty years, where the draft EIA report identifies the life of the mine to be thirty one (31) years.¹ The bauxite mined at Sijimali will feed into the pre-existing refinery at Lanjigarh in Kalahandi district, set up by the project proponent in 2007 for an approved capacity of 2 MTPA, now enhanced to 6 MTPA.² Originally leased to M/S Larsen and Toubro over an area of 1549.09 ha,³ the current project proponent was selected as the preferred bidder

¹ Proposal Number IA/OR/MIN/423359/2023, submitted by project proponent for single-window clearance dated 25 March 2023, available on <www.parivesh.nic.in>, last visited on 03 March 2024.

² JM Environet Ltd., *Draft Environmental Impact Assessment Report: Sijimali Bauxite Mine* dt. August 2023 [“Draft EIA Report”], pg.43, para 1.2; ‘Vedanta refinery gets pollution board nod for expansion’, BUSINESS TODAY, 05 January 2016, available at <<https://www.businesstoday.in/industry/energy/story/vedanta-refinery-gets-pollution-board-nod-for-expansion-60683-2016-01-05>>.

³ Ministry of Environment, Forests and Climate Change, Terms of Reference vide Proposal No. IA/OR/MIN/35455/2015, File No. J11015/100/2016-IA II(M), 15 March 2016.

for mining these bauxite reserves by an e-auction on 09 February 2023 by the Government of Odisha. The Letter of Intent (LOI) was issued to the project proponent under Rule 10(2) of Mineral (Auction) Rules, on 01 March 2023, which is valid up to 28 February 2026 (to commence operations).⁴ Following this, the project proponent submitted its proposals for clearances under the Environmental Protection Act, 1986 (EPA), Forest Conservation Act, 1980 (FCA) among others on 04 May 2023 and 29 May 2023 respectively.⁵

At the time of writing this report in January 2024, the Project Screening Committee (PSC) which reviews proposals for forest diversion under the FCA had *rejected* the proposal on 02 June 2023, with leave to submit a fresh proposal.⁶ Separately, the proposal is currently pending environmental clearance before the Environmental Appraisal Committee (EAC) set up by the Environmental Impact Assessment (EIA) Notification 2006, issued under Section 3 of the Environment (Protection) Act, 1986. Pursuant to this, the draft EIA report has been submitted by M/S JM EnviroNet Pvt. Ltd.,⁷ and the public hearing process thereunder has concluded.⁸ In addition to the environmental and forest clearance, the project also needs to obtain wildlife clearance under the Wildlife Protection Act, 1972 (WLPA) as well as other certificates under various laws relating to pollution to set up and begin operations at the site. As the various clearance processes required by law are still ongoing, this report is able to capture developments only up to the period of 31 December 2023. The project proponent has submitted the mining plan for approval to the Indian Bureau of Mines, which is presently pending.

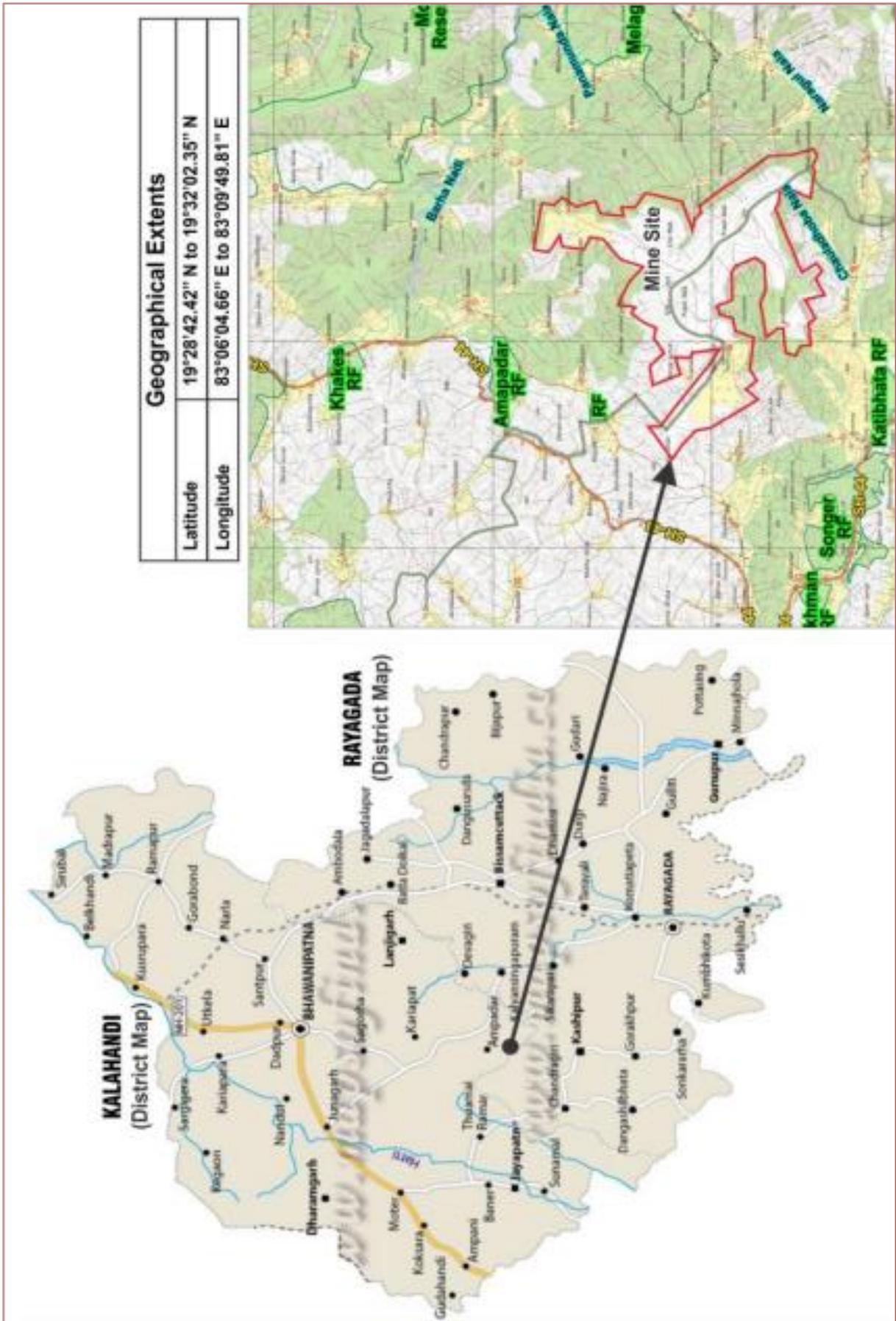
⁴ Government of Odisha, Letter no. 2103/SM-MC2-MC-0006-2023/2103/S&M, Bhubaneswar, 01 March 2023.

⁵ Proposal (n 1); Project Proponent, *Forest Clearance Proposal* dt. 29 May 2023 [“Forest Clearance Proposal”].

⁶ 14th MOM of Project Screening Committee under Forest Conservation Act, 1980 held on 02 June 2023, *available at* <https://parivesh.nic.in/newupgrade/#/proposal-summary/proposal-document?proposal=5701549&proposal_no=FP%2FOR%2FMIN%2FQRY%2F431317%2F2023&proposal_id=5701548>, last accessed 23rd January 2024.

⁷ As per their website, **J. M. EnviroNet Pvt. Ltd.** is an Environmental Engineering Services and Solution provider established in 1993. JM has already completed 25 years of service with corporate clients in the field of environment management & solutions, *available at* <<http://www.jmenvironet.org/>>, *last accessed* 03 March 2024.

⁸ Public Hearing Proceedings, *available at* <https://parivesh.nic.in/newupgrade/#/proposal-summary/proposal-document?proposal=4176447&proposal_no=IA%2FOR%2FMIN%2F423359%2F2023&proposal_id=4176446>, uploaded on Parivesh website 29 December 2023, last accessed 23 January 2024.



(Location Map from Draft EIA Report at pg. 52)

In August-September 2023, our attention to this project was drawn due to reporting in national⁹ and international media,¹⁰ as well as by human rights organizations,¹¹ recounting arrests, detentions, registration of FIRs under IPC and the anti-terror law UAPA and other forms of human rights violations against the people of Rayagada and Kalahandi. Both these districts are Scheduled Areas under the V Schedule of the Constitution, recognizing the rights of *adivasis* to autonomy and self-governance. The major STs of the region are Kondh, Paroja, Munda, Kondadora and Korua and major Scheduled Caste communities (SCs) are Dom, Ghasi, Kandara and Relli.¹² The draft EIA Report notes that ninety-eight villages lie within a ten kilo-meter (km) radius of the project area, comprising almost seven thousand (7000) households with a population of more than twenty-eight thousand (28000) persons, out of which about eighteen thousand belong (18000) to STs and five thousand (5000) to SCs. Twenty three villages lie within the immediate vicinity of the project (0-3km), forty villages within 3-7km radius, and thirty villages in the 7-10km radius.¹³ All these households are primarily dependent on land and forests for their livelihood – there are farmers and agricultural workers of various hues,¹⁴

⁹ Rajaraman Sundaresan, Evanjelina Kullu & Debabrata Behera 'In Photos: Dalits, Adivasis in Odisha's Tijmali Push Back Against Project proponent's Mining Bid', THE WIRE, 15 November 2023, *available at* <<https://thewire.in/rights/photo-essay-dalits-Adivasis-in-odishas-tijmali-fight-back-vedantas-mining-bid>> accessed 06 January 2024.

¹⁰ Hannah Ellis-Petersen & Aakash Hassan, "We Are Powerless": Indian Villagers Live in Fear of Torture in Fight against Bauxite Mine', THE GUARDIAN, 10 November 2023, *available at* <<https://www.theguardian.com/environment/2023/nov/10/indian-villagers-fear-torture-fight-bauxite-mine-Adivasis>> accessed 15 January 2024.

¹¹ 'Free Niyamgiri!', PUDR, 21 August 2023, *available at* <<http://pudr.org/free-niyamgiri-stop-arrests-illegal-detentions-and-attacks-nss-and-people-kashipur-0>> *accessed* 23rd January 2023; Aishwarya Mohanty, 'How Odisha Is Tackling Protests Against Mining: An Abduction, Arrests, Terror Cases Against Adivasi 'Protestors'', Article 14, 15 September 2023, *available at* <<https://article-14.com/post/how-odisha-is-tackling-protests-against-mining-an-abduction-arrests-terror-cases-against-Adivasi-protestors--6503c8884ba63>> *accessed* 23 January 2023; 'Villagers Appeal To Cancel Public Hearing of Project proponent's Bauxite Mining in Sijimali And Kutramali, Odisha', groundxero, 12 October 2023, *available at* <<https://www.groundxero.in/2023/10/12/villagers-appeal-to-cancel-public-hearing-of-project-proponents-bauxite-mining-in-sijimali-and-kutramali-odisha/>> *accessed* 23 January 2024; 'Coerced Gram Sabhas in Sijimali: A Grave Travesty of Justice', groundxero, 10 December 2023, *available at* <<https://www.groundxero.in/2023/12/10/coerced-gram-sabhas-in-sijimali-a-grave-travesty-of-justice/>> *accessed* 15 January 2024; 'Stop Conducting Fake Gram Sabhas At Gunpoint In Rayagada, Odisha' Countercurrents, 10 December 2023, *available at* <<https://countercurrents.org/2023/12/stop-conducting-fake-gram-sabhas-at-gunpoint-in-rayagada-odisha/>> *accessed* 23 January 2024.

¹² See generally, 'The Tribes of Odisha', Scheduled Castes and Scheduled Tribes Research and Training Institute, *available at* <<https://www.scstrti.in/index.php/communities/tribes>> *accessed* 25 February 2024.

¹³ Draft EIA Report (n 2), pg.117 et seqq.

entitled to rights under the Forest Rights Act (FRA), whose primary source of nutrition, water, and health are forests and forest resources,¹⁵ and whose sacred groves lie in the mountains and forests of the area.¹⁶ These are also areas with low literacy rates (42.71%), but high sex ratios ranging from 994 to 1097.¹⁷

Human rights violations accompanying mining projects are not uncommon for indigenous peoples either in India or globally.¹⁸ The mining industry is one of the largest violators of human rights of indigenous peoples in the world, accounting for over 24% of reported violations.¹⁹ In India too, *adivasis* have borne the disproportionate brunt of development projects, leading to the displacement of over 50 million *adivasis* in the past 50 years.²⁰ In fact, the antecedents of this project of bauxite mining in Odisha to feed the same Lanjigarh refinery too is laced with human rights violations.²¹ On 28 April 2009, Sterlite (subsidiary company of the project proponent), the current project proponent, had obtained the environment clearance to mine bauxite over 721.323 ha in the Niyamgiri hills of Lanjigarh Tehsil of Rayagada and Kalahandi districts of Odisha. In 2013, the project was eventually unanimously rejected by all twelve gram sabhas of affected villages following the landmark Supreme Court verdict in *Orissa Mining Corporation v.*

¹⁴ 'Thuamul Rampur Block Population, Religion, Caste Kalahandi District, Odisha - Census India' <<https://www.censusindia.co.in/subdistrict/thuamul-rampur-block-kalahandi-odisha-3171>> accessed 23 January 2024.

¹⁵ Khond Tribe, 'Other Distinct Socio-Cultural Features', SC & ST Research and Training Institute, Bhubaneswar available at <https://www.scstrti.in/index.php?option=com_content&view=article&id=176%3Akhond> accessed 04 January 2024.

¹⁶ *ibid*

¹⁷ Thuamul Rampur Block Population (n 14).

¹⁸ Susan Chacko, 'Companies Mining Energy Transition Minerals Committed Hundreds of Human Rights Abuse Cases: Report', Down to Earth, 08 June 2023, available at <<https://www.downtoearth.org.in/news/mining/companies-mining-energy-transition-minerals-committed-hundreds-of-human-rights-abuse-cases-report-89915>> accessed 23 January 2024.

¹⁹ Nyla Husain, 'Global Extractive and Industrial Projects Disproportionately Impact Indigenous Peoples', American Association for the Advancement of Science (AAAS), 09 June 2023, available at <<https://www.aaas.org/news/global-extractive-and-industrial-projects-disproportionately-impact-indigenous-peoples>> accessed 25 February 2024.

²⁰ N. Singh Negi & Sujata Ganguly, 'Development projects vs. internally displaced populations in India: a literature-based appraisal' COMCAD Working Papers, Bielefeld: Universität Bielefeld, Fak. für Soziologie, Centre on Migration, Citizenship and Development (COMCAD), [2011], p 6.

²¹ Anjali George 'Claiming Niyamgiri: The Dongria Kondh's Struggle against Vedanta' *ritimo*, 18 December 2014, available at <<https://www.ritimo.org/Claiming-Niyamgiri-the-Dongria-Kondh-s-Struggle-against-Vedanta#:~:text=Starting%20from%20the%20appearance%20of,but%20also%20on%20the%20Dongria>> accessed 23 January 2024, 'Vedanta's Perspective Uncovered: Policies Cannot Mask Practices in Orissa', Amnesty International, 2012, available at <<https://www.amnesty.org.uk/files/vedanta2.pdf>> accessed 1 March 2024.

Ministry of Environment and Forests (‘Niyamgiri judgment’),²² upholding the rights of affected communities to free, prior and informed consent under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act [Forest Rights Act or FRA]. Since then, the Lanjigarh refinery has been operating at significant losses, with one news report in 2016 stating losses of Rs. 3 crores per day on account of ‘non-availability of domestic raw material.’²³ In fact, the Conservation Management Plan (CMP) part of the environment clearance process notes that both Kalahandi and Rayagada have witnessed a 3-5% decrease in forest cover over the past decade, mainly on account of mining.²⁴

This wider canvas of human rights and environmental violations accompanying mining projects, however, was not our sole motivation for entering into this exercise of studying the current project. There are two other, more immediate concerns. This project comes close on the heels of ongoing regulatory reforms in the mining and environmental sector, undermining key safeguards for environmental and rights protections of affected communities. These include dilution of forest rights and right to free, prior and informed consent of communities, retrospective regularization of environmental violations and encroachments by large projects etc.²⁵

Even as we were conducting our research, in December 2023, the Ministry of Environment, Forests and Climate Change (MoEFCC) notified the Forest (Conservation) Rules 2023, closely following the Forest (Conservation) Rules of 2022, both of which undermine consent and consultation requirements through the forest clearance processes under the FCA for meeting Ease of Doing Business

²² [2013] 6 S.C.R. 881.

²³ Vedanta refinery gets pollution board nod (n 2).

²⁴ Conservation Management Plan, *available at* <www.parivesh.nic.in>, page 4, para 3.3, *accessed* on 03 March 2024.

²⁵ Abhijit Mohanty, ‘Why Draft EIA 2020 Needs a Revaluation’, Down To Earth, 06 July 2020, *available at* <<https://www.downtoearth.org.in/blog/environment/why-draft-eia-2020-needs-a-revaluation-72148>> *accessed* 25 February 2024; Jayashree Nandi, ‘Recent Environment Rules Mirror Controversial Draft’, Hindustan Times, 4 June 2022, *available at* <<https://www.hindustantimes.com/india-news/recent-environment-rules-mirror-controversial-draft-101654367194857.html>> *accessed* 25 February 2024; PTI, ‘India’s Mining Sector to Witness Reforms, Flurry of Activities in 2021’, Deccan Herald, 28 December 2020, *available at* <<https://www.deccanherald.com/business/indias-mining-sector-to-witness-reforms-flurry-of-activities-in-2021-932394.html>> *accessed* 25 February 2024; Karunjit Singh, ‘New Deal for Coal/Mineral Auctions: What Does MMDR Amendment Bill, 2021 Entail?’, The Indian Express, 18 March 2021, *available at* <<https://indianexpress.com/article/explained/mmdr-amendment-bill-2021-explained-7233672/>> *accessed* 25 February 2024.

goals.²⁶ In August 2023, the Parliament had also passed the Forest Conservation (Amendment) Act 2023. Prior to this, the MoEFCC had proposed the draft EIA Rules 2020, again significantly overhauling the environmental clearance process under the EPA. While the draft Rules could not be passed due to wide opposition from environmentalists, human rights researchers and organizations and lawyers,²⁷ the MoEFCC, through the course of the COVID-19 pandemic, notified several of its provisions in a piecemeal manner. In fact, over the past five-year period, the Mines and Minerals (Development and Regulation) Act, 1957 (MMDR) has also witnessed significant reforms.²⁸ These overhauls bear directly on concerns of human rights of *adivasis*, particularly the core rights of *jal, jangal, zameen*, or to land, autonomy, and self-governance in constitutional parlance.

²⁶ Rishika Pardikar, 'Explained: What Will the Amended Forest (Conservation) Act Change?', *The Hindu*, 01 August 2023, *available at* <<https://www.thehindu.com/sci-tech/energy-and-environment/explained-what-will-the-amended-forest-conservation-act-change/article67146543.ece>> *accessed* 25 February 2024; 'The Forest (Conservation) Amendment Bill, 2023', PRS Legislative Research, *available at* <<https://prsindia.org/billtrack/the-forest-conservation-amendment-bill-2023>> *accessed* 25 February 2024; Vaishali Rawat, 'Greenlight for Destruction: Controversial Forest Act Opens Door to Unfettered Deforestation', *Frontline*, 10 January 2024, *available at* <<https://frontline.thehindu.com/environment/the-forest-conservation-amendment-act-2023-dramatically-alters-forest-governance-in-india/article67726166.ece>> *accessed* 25 February 2024; Zeb Hasan, 'The Amended Green Law Is Full of Red Flags', *Supreme Court Observer*, 29 December 2023, *available at* <<https://www.scobserver.in/journal/the-amended-green-law-is-full-of-red-flags-forests-amendment-act-2023/>> *accessed* 25 February 2024; Sharachchandra Lele, 'Forest Law Amendments: Rich in Rhetoric, Poor in Substance', *The Indian Express*, 02 August 2023, *available at* <<https://indianexpress.com/article/opinion/columns/forest-conservation-amendment-bill-2023-positive-environmental-benefits-green-gutting-sc-1996-godavarman-order-8871986/>> *accessed* 25 February 2024; Garima Thakur, 'Exigency of an Overhaul in Forest Law: How the Forest (Conservation) Amendment Act, 2023, has Transformed India's Forest Regime', 16 *NUJS L. Rev.* 1 (2023).

²⁷ Stellina Jolly, 'Draft EIA Notification 2020 Is Out of Sync With State Practices, International Law', *The Wire*, 31 July 2020, *available at* <<https://thewire.in/environment/draft-environment-impact-assessment-notification-international-law>> *accessed* 25 February 2024; Jayashree Nandi 'Why Naga People's Front Has Opposed the Forest Conservation (Amendment) Act 2023', *Hindustan Times*, 09 August 2023, *available at* <<https://www.hindustantimes.com/india-news/indias-new-forest-conservation-law-faces-opposition-from-naga-people-s-front-deemed-antitribal-101691551815887.html>> *accessed* 25 February 2024; Awstika Das, 'Former Civil Servants Challenge 2023 Amendments To Forest Conservation Act; Supreme Court Seeks Centre's Response', *Live Law*, 20 October 2023, *available at* <<https://www.livelaw.in/top-stories/supreme-court-environment-law-ministries-2023-amendments-forest-conservation-act-240689>> *accessed* 25 February 2024.

²⁸ Abir Dasgupta, 'Did Ministry of Mines Disregard Critical Suggestions on Mining Reforms?' *News Click*, 25 February 2021, *available at* <<https://www.newslick.in/Ministry-Mines-Disregard-Critical-Suggestions-Mining-Reforms>> *accessed* 25 February 2024; Subhash Narayan, 'Mint Explainer: How Will Changes to the Law Affect India's Mining Sector?' *Mint*, 17 September 2023, *available at* <<https://www.livemint.com/industry/mint-explainer-how-will-changes-to-the-law-affect-indias-mining-sector-11694935125585.html>> *accessed* 25 February 2024; MD Gupta, 'Union Cabinet Clears Commercial Mining of Lithium & 5 Other Critical Minerals' *The Print*, 12 July 2023, *available at* <<https://theprint.in/india/governance/union-cabinet-clears-commercial-mining-of-lithium-5-other-critical-minerals/1666679/>> *accessed* 25 February 2024.

This is one of the first large projects to fall under the new regulatory environment for mining. In order to evaluate this project's compliance with the law, it was imperative for us to piece together this new regulatory environment in the first place. Thus, quite apart from the specifics of the project itself, practitioners, activists and community organizations will find in this report a step-by-step guide on the various clearance processes, along with the relevant authorities entrusted with its enforcement.

The other, more immediate concern is the paucity of reportage and independent evaluations of the impact of the proposed project on the people and environment. Far removed from the national capital, developments in Rayagada and Kalahandi do not ordinarily find themselves in news cycles. This invisibilization is exacerbated in an environment of repression and police deployment.²⁹ Combined with the break-neck speed at which the proposal is proceeding through the clearance processes, in keeping with the condensed timelines under the new regulatory regime, opportunities for participation and independent review are greatly reduced. So far, there have been no visits from fact-finding teams or independent experts to document the impact of the proposed project.

As students and researchers based in Bangalore, Karnataka, we too found ourselves disabled from undertaking investigative field inquiries. Further, as legal researchers, meticulous examination of, say, soil samples and air quality lie far outside our domain of expertise. Accordingly, this report turns to the draft EIA report, accounts of the public hearings, newspaper coverage and other secondary resources to insert a relatively early note of restraint, or precaution if you may, on the prudence of an extractive project in the midst of a worsening climate crisis and environmental degradation.

Methodology

²⁹ *Ellis-Petersen H & Hassan A* (n 10); 'India: Alleged Violence & Intimidation against Human Rights Defenders during Public Hearing for Vedanta's Proposed Mining Project; Incl. Company Response', Business & Human Rights Resource Centre, 06 November 2023, *available at* <<https://www.business-humanrights.org/en/latest-news/india-allegations-of-violence-against-human-rights-defenders-during-public-hearing-for-vedantas-proposed-mining-project-incl-company-response/>> *accessed* 25 February 2024; 'Sijimali Bauxite Mining Project Hearing Held Under Massive Police Repression', Countercurrents, 17 October 2023, *available at* <<https://countercurrents.org/2023/10/sijimali-bauxite-mining-project-hearing-held-under-massive-police-repression/>> *accessed* 25 February 2024.

This report, thus, addresses, two inter-related queries. **Part A** describes the legal framework governing mining, environment and the rights of *adivasis* and indigenous peoples under domestic and international law. Here, the focus is on the normative and procedural framework through different stages of approvals for mining projects. The processes for approvals are framed chronologically, with an emphasis on the rights and obligations of key actors involved in the clearance process, namely, (i) state actors (ii) project proponent as non-state actors and (iii) rightsholders and affected communities.

This is drawn from primary legal instruments from the domestic and international sphere, such as statutes, executive instruments (Rules, guidelines, circulars etc.) and international declarations and conventions. Executive instruments were accessed from the *Parivesh* website of the MoEFCC. Where the *Parivesh* website was insufficient, the Gazette notifications were looked at. These primary legal instruments are supplemented with secondary research, wherever necessary.

Part B scrutinizes the claimed impact of the project on the people and the environment on the touchstone of human rights and the precautionary principle of environmental governance. It is pertinent to note upfront that the study does not undertake an independent verification of the impact of the proposed project on the people and the environment. Our team was constrained in undertaking extensive ground-truthing and fact-finding into the matter on account of security concerns prevailing on the ground immediately preceding our research project. Further, as lawyers and law students, a technical evaluation of, say, air, water, soil quality is beyond the scope of our expertise.

Accordingly, Part B proceeds through a triangulation of various primary and secondary sources describing the environmental and social impact of the proposed project as well as of bauxite mining generally. Primary sources include publicly available documents on the *Parivesh* website tracking the clearance process for the current project. These encompass:

- i) Documents submitted by the project proponent and its consultants as part of the environmental and forest clearance processes, such as the project proposal, the draft EIA report, the Conservation Management Plan, responses to the public hearings. The cut-off date for our analysis is 20 January 2024.

- ii) Documents recording the actions of state authorities involved in the approval processes. These include: agenda and minutes of the meetings of the Environmental Assessment Committee (EAC), the Project Screening Committee (PSC), records of the two public hearings conducted in Rayagada and Kalahandi. The cut-off date for our analysis here is also 31 December 2023.
- iii) Documents recording comments and objections raised by rightsholders and affected communities. These include record of public hearings prepared by state officials and uploaded on the *Parivesh* website, and other representations made by individuals and organizations to public bodies.

These primary sources are supplemented by the following secondary sources:

- i) Scholarly and civil society research on the impact of bauxite mining generally, through references to other case studies around the world.
- ii) News reports and statements by human rights organizations documenting ongoing developments in Kalahandi and Rayagada, as well as testimonies of rightsholders and affected communities.

This report is limited to a study of the legal framework as applicable to the state of Odisha only, and relies on sources that are publicly available and in the English language. Sources that are not publicly available or in languages other than English have not been included in this study.

The report concludes that the project violates land, autonomy and self-governance rights of affected communities, and the precautionary principle of environmental governance. The report, based on our findings, recommends an independent assessment by expert and civil society and calls for greater scrutiny by state authorities changes to the proposed project, as well as the design and implementation of the legal framework governing mining in India overall.

Salient Features of the Project

(as per project proposal dt.25 March 2023 and draft EIA report)

Project Description

Name	Sijimali Bauxite Mine
Project Proponent	M/S Vedanta Pvt. Ltd., registered office at Patto, Panjim, Goa
Type of Project	Integrated project for bauxite mining with proposed production capacity of 9.00 MTPA and setting up of two crushers with 1200 TPH capacity
Method of Mining	Open-cast, mechanized
Total Excavation	18.00 MTPA
Water Requirement	725 KLD (groundwater requirement 575 KLD)
Electricity	4.5 MW
Waste Generation	7.40 MTPA

Timeline of Events

LoI under MMDR Act	01.03.2023
Application for Environmental Clearance	04.05.2023
Application for Forest Clearance submitted	29.05.2023
EAC meetings on the project held	30.05.2023 – 11.07.2023
PSC meetings on the project held	02.06.2023
TOR Granted	11.07.2023
Draft EIA Report submitted	14.08.2023
Public hearings held	16.10.2023 (Rayagada) and 18.10.2023 (Kalabandi)
Gram Sabha Proceedings (10 villages) under FRA	23.11.2023 and 08.12.2023
NOC Granted by DLC	18.01.2024

Current Status

Mining Lease	Granted
Environmental Clearance	Pending
Forest Clearance	Pending
Mining Plan	Pending

Geography and Ecology

Location	Thuamul Rampur Tehsil in Kalahadi district and Kashipur Tehsil in Rayagada district of Odisha		
Geographical area covered	1549.022 ha		
Type and area of land covered*	Forest Land	Government Land	Private Agricultural Land
	699.70 ha	722.9 ha	127.9 ha
Land Use (core area)**	Vegetation/Plantation	726 ha (46.81%)	
	Open scrub/ Waste land	685 ha (44.29%)	
	Agricultural land	119 ha (7.71%)	
	Road	17 ha (1.11%)	
	Settlement	2.01 ha (0.06%)	
	Surface water bodies	0.01 ha (0.02%)	
Floral diversity (core and buffer area)	Trees	73	
	Shrubs	21	

Herbs	32
Climbers	28

Major plant and vegetation species Sal (*shorea robusta*), Saguean (*tectona grandis*), Neem (*azadirachta indica*), Khajur (*phoenix sylvestris*), Jungle Baigana (*Solanum viarum* Dunal) etc.

Faunal diversity (core and buffer area)

Amphibians	11
Reptiles	23
Avian fauna	53
Mammals	20

Schedule I WLPFA faunal species in core and buffer area (critically endangered or those requiring highest level of protection) Jungle cat, Common palm civet, Small Indian civet, Indian grey mongoose, Bengal fox, Sloth bear, Honey badger, Indian chamaeleon, Indian golden gecko, Bengal monitor lizard, Indian Rock Python, Indian Rat Snake, King cobra

Social Profile

Villages covered by mining site: 18 nos. (Chulbadi, Dumerpadara, Katibhata, Kutamal, Taramundi, Uparambpadar, Salebali, Tadadei, Talambpadar (As per FC proposal Tarapadar), Aliguna, Bundel, Pelanakona, Shagabari, Malipadar, Tijmali, Ambajhola, Mahajal, Nakarundi)

Demography (*tehsils*):

	Population	Male	Female	ST	SC
Thuamul-Rampur	77,840	38,113	39,727	45,287	19,742
Kashipur	70,542	34,059	36,483	14,602	41,450

Demography (villages covered by mining site)*:**

Village	household Nos.	Total popn.	Male popn.	Female popn.	ST popn.	SC popn.
Nakarundi	81	362	188	174	233	105
Mahajal	12	64	31	33	64	0
Taramundi	25	128	57	71	115	13
Ambajhola	56	254	122	132	194	59
Tijmali	21	99	45	54	99	0
Uparambpadar	16	70	25	45	64	6
Chulbadi	116	477	215	262	316	80
Dumerpadara	65	257	118	139	170	87
Malipadara	38	143	66	77	143	0
Shagabari	226	756	358	398	384	261
Aliguna	47	147	67	80	147	0
Bundel	52	203	105	98	145	52
Kutamal	117	469	222	247	387	80
TOTAL	872	3429	1619	1810	2461	743

Project displaced families: 100²

Project affected families: 500²

** As per LoI issued under the MMDR Act and the original proposal, the project area comprised 157.90 ha of forest land, 133.81 ha of private agricultural land, and 1257ha of government land. This was subsequently revised in the forest clearance proposal and the draft EIA report based on the revised certified land schedule.*

*** There are 21 reserve forests and 09 water bodies within a 10km radius of the proposed mine.*

**** The draft EIA report provides information for only 13 out of the 18 villages.*

²These figures have been contested in the public hearings.

Part A

Legal Framework Governing Mining Projects in India



ଭେଦୋ ମାଣ୍ୟ ଚାହେଇ ଦିଏ
ରାଜେଇ ଭରି ବସି ହୁଏ॥

ଗାଁ ଗାଁ ରେ ଡାକ୍ତର ନାହିଁ,
ମାଷ୍ଟର ନାହିଁ!!!
ସରକାର ତମ ଜନଶୁଣାଣୀ
କାଲି ପାଉଁଁ

ଓଡ଼ିଆ ସମାଜ ସେବା
ଓଡ଼ିଆ ସମାଜ ସେବା
ଓଡ଼ିଆ ସମାଜ ସେବା

Photograph by
Rajaraman
Sundaresan

Context and Legal History

This Part answers traces the legal framework governing mining projects in India. This Part first identifies the fundamental, constitutional, and human rights of *adivasis* and other affected communities under domestic and international law in Chapter 1. Chapter 2 outlines key principles of environmental governance, under domestic and international law to which the State's law-making and executive authority is subject, in the service of environmental protection and combating climate change. Chapter 3 undertakes an extensive description of the laws applicable to mining projects in the sectors of land, forest, mines and minerals, environment, pollution, and others, paying particular heed to legal processes, rights, obligations, relevant authorities and avenues for post-clearance monitoring and redress.

This exercise is important for two reasons. *First*, to determine whether the Sijimali bauxite mining project complies with human rights and environmental norms, it is important to identify the applicable norms in the first place. Under formal law, these norms have effect or are enforceable, only to the extent that they are recognized under State law. *Second*, since State law is neither fixed nor certain but constantly subject to contestations, the regime of applicable laws and norms are ever-evolving, having undergone a sea-change over the past decade and particularly over the COVID pandemic. Thus, capturing this framework of complex and ever-evolving laws and norms is important for researchers and practitioners alike to evaluate and monitor legal, environmental and rights compliances of similar projects in the future.

But first, this introductory section offers a highly truncated historical and political backdrop of these contestations over laws and legal systems.

Land has been the subject of historical conflict between the colonial/ postcolonial State and *adivasis* for more than two centuries now, articulated through claims over *jal-jangal-zameen*. *adivasis* assert close political, cultural, economic, and social ties with their customary lands and resources, for land is a multi-dimensional resource securing not only life and livelihood, but also cultural identity and collective belonging.

The Census of India 2011 reports that more than 70% of STs in Odisha continue to be engaged in agriculture and allied occupations, whereas the figure stands at

31% for the overall population in the state.³⁰ Allied occupations include collection of minor forest produce, animal husbandry etc., all of which depend on secure rights and access to forest commons in addition to marginal land holdings for individual households. In addition, for *adivasis* and other forest-dependent communities, commons are also a key source of health, nutritional security and traditional scientific knowledge. In fact, where women in caste- and *adivasi* households are frequently excluded from individual property rights in land, this is to some extent ameliorated through their rights to forest commons and community resources.³¹

Land is also a source of history, belief and belonging. Collective identities of belonging to a community, with a shared history and culture, are fostered through daily practices of living and tending together to customary resources. Contrary to the image of colonial/postcolonial legal systems and conservation models of *adivasis* and forest-dependent communities as ‘encroachers’ and threats to the environment,³² domestic policies,³³ international legal and development institutions, environmentalists and most importantly, communities themselves view them as ‘the best stewards of the environment’.³⁴ Globally, indigenous peoples assert close cultural and religious ties to their customary lands and resources, where mountains, rivers and rain are worshipped as abodes of deities.

Adivasis have historically faced physical and legal dispossession from their customary lands and resources by colonial/postcolonial legal systems, which encode the doctrine of eminent domain and appropriate natural resources for the State. Colonial laws such as the Indian Forest Act (which continues to be in effect and is the primary forest legislation) vested ownership of forests and its resources in the State, and their governance in instrumentalities of the State, specifically the forest department, to the exclusion of pre-existing rights of *adivasis*. The colonial State also enacted laws relating to mineral resources, land acquisition etc. again

³⁰ Ministry of Tribal Affairs, Statistical Profile of Scheduled Tribes in India, (2013) p.253.

³¹ Sumi Krishna, *Genderscapes: Revisioning Natural Resource Management* (2008).

³² Radhika Chitkara and Khushboo Pareek, ‘The Right to Land: A Study on Legality of Forced Evictions’, 2 NLUJ JOURNAL OF LEGAL STUDIES 69-88 (2020).

³³ National Forest Policy 1988.

³⁴ See for instance UNFAO and FILAC, ‘Forest governance by indigenous and tribal peoples. An opportunity for climate action in Latin America and the Caribbean’, (2021); Forest Peoples Programme, ‘Local Biodiversity Outlooks 2: The contributions of indigenous peoples and local communities to the implementation of the Strategic Plan for Biodiversity 2011–2020 and to renewing nature and cultures’, (2020).

premised on the doctrine of eminent domain, which continue to exist either in the same form or the same substance today.³⁵

Peoples struggles under colonial rule were, to some extent, successful in resisting this legal dispossession, leading to the creation of ‘excluded’ and ‘partially excluded areas’ in the north-east and eastern states of present-day India, where the executive power of the colonial state was limited, and the enactment of laws like the Chhotanagpur Tenancy Act (‘CNTA’) and the Santhal Parghana Tenancy Act (‘SPTA’) over present-day Jharkhand, which early in the twentieth century expressly recognized the customary lands of *adivasis* and their right to self-governance through customary laws and institutions like the *gram sabha*. The ‘excluded areas’ and ‘partially excluded areas’ under colonial rule paved the way for the V and VI Schedules under the Indian Constitution recognizing the right to autonomy of *adivasis* over their lands, laws and institutions, where Sixth Schedule areas enjoy a significantly higher degree of autonomy protections. However, unlike under colonial rule, where colonial laws did not apply by default to partially excluded areas but had to be specifically extended, the Fifth Schedule reverses this principle such that laws enacted by the State apply by default unless expressly excluded by the Governor.

As such, processes of legal and physical dispossession continued unabated even after Independence, as large swathes of *adivasi* lands and forests were forcefully taken up for large development projects, and the legal system strengthened its powers of eminent domain through laws such as the Forest Conservation Act 1980 (FCA), which set up a centralized statutory mechanism for diversion of forests for non-forest purposes. Under these laws, even in the absence of systematic documentation, the Report of the High-Level Committee on Socioeconomic, Health and Educational Status of Tribal Communities of India, 2014 (Xaxa Committee Report) states that more than 60 million STs have been displaced since Independence until 2000 in the pursuit of industrialized modes of development. Of the total numbers displaced for development projects, 47% are STs.³⁶

Even beyond this mammoth scale of physical displacement and dispossession, the legal system wreaks legal dispossession through its negation of collective customary

³⁵ Chitkara & Pareek (n 32).

³⁶ Ministry of Tribal Affairs, Report of the High-Level Committee on Socio-Economic, Health and Educational Status of Tribal Communities in India, (2014) p.258.

rights of ownership, use, access and self-governance of land and forest resources. The State retains the legal authority to determine ‘lawful’ and ‘unlawful’ uses of land, administrative categorization of STs, their status as rightsholders or encroachers, as well as developmental priorities and allocation of resources. In post-Independence India, laws such as the Panchayat (Extension to Scheduled Areas) Act, 1996 (‘PESA’) and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (‘FRA’) statutorily encode the rights of STs and other forest-dwelling communities to their customary lands and decision-making through *gram sabhas*.

Against this backdrop of ‘historical injustice’- a phrase invoked by the preambles of the FRA as well as the United Nations Declaration on the Rights of Indigenous Peoples (‘UNDRIP’), the right to autonomy and self-governance over customary lands, through customary institutions, assumes paramount importance in the pursuit of human development. As Articles 3-5 of the UNDRIP recognize, indigenous peoples have the right to freely determine their political status and pursue their economic, social and cultural development, the right to autonomy and self-governance in relation to their local affairs, and the right to maintain and strengthen their political, legal, economic, social and cultural institutions. India voted in favor of the adoption of the UNDRIP at the General Assembly in 2007. The Fifth and Sixth Schedule of the Constitution, along with statutes like the CNTA, SPTA, PESA and FRA independently guarantee the right to autonomy and self-governance to *adivasis* and indigenous peoples.

Thus, while the State in India retains primary law-making authority over lands and resources, where the legal system is scaffolded on the doctrine of eminent domain, it is bound by its constitutional and international human rights obligations, enabled by statute, to protect and uphold the right to land and autonomy.

The State is also bound by its international commitments on climate change and sustainable development, and the constitutional mandate of environmental protection under Article 48 of the Directive Principles of State Policy. The body of laws and norms pertaining to environmental governance also increasingly recognize that States hold land and resources not as owners, but as custodians

under the *public trust* doctrine.³⁷ This is distinct from the notion of ‘public interest’ in laws such as LARR, where the State retains the authority to determine what does and does not constitute public interest, and which has historically resulted in inequitable developmental outcomes and long-lasting environmental harms. The public trust doctrine casts an obligation on the State to secure resource use and allocation consonant with the goals of rights protection and sustainable development. Sustainable development, as defined in the Rio Declaration refers to a model of development that “*meets the needs of the present, without comprising the ability of future generations to meet their own needs.*”³⁸ Principle 15 of the same Declaration also encodes the precautionary principle requires that States exercise their decision-making authority in a manner as to and prevent environmental harm. Specifically, it requires that in cases where there is threat of serious or irreversible environmental damage, States are obligated to take preventive action to protect the environment and prevent its degradation.³⁹ This is particularly relevant in the case of extractive projects, which inevitably result in long-term large-scale irreversible environmental harm to all natural resources and peoples in its vicinity (and beyond).

Lastly, it is not only States but also businesses that are increasingly subject to human rights and environmental obligations under international and domestic law. Notable among these are the UN Guiding Principles on Business and Human Rights, which identify the human rights obligations of businesses along the three pillars of protect, respect and remedy.⁴⁰ Although these are non-binding, they build on legal standards and doctrines already existing in public and private law of various national jurisdictions, and are being increasingly adopted by various international bodies of commerce and industry as a tool for self-regulation.⁴¹ Such

³⁷ David Takacs, ‘The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property’, 16 NEW YORK UNIVERSITY ENVIRONMENTAL LAW JOURNAL 711 (2008); Shibani Ghosh, ‘Public Trust Doctrine in Indian Environmental Law’, in *Indian Environmental Law: Key Concepts and Principles* (2019).

³⁸ United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, (1992).

³⁹ D. Kriebel et al, ‘The Precautionary Principle in Environmental Science’, 109(9) ENVIRON HEALTH PERSPECT 871-876 (2001); European Parliamentary Research Service, *The Precautionary Principle: Definitions, Applications and Governance* (2015).

⁴⁰ UN Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, 2011.

⁴¹ Rene Wolfsteller & Yingru Li, ‘Business and Human Rights Regulation After the UN Guiding Principles: Accountability, Governance, Effectiveness’, 23 HUMAN RIGHTS REVIEW 1–17 (2022).

obligations address a notable limitation of domestic laws and policies, where States particularly those in the South, are reluctant to enforce obligations and liabilities against large corporations in the interest of ease of doing business.

Against this wide canvas of laws, norms and peoples struggles, there is history to way State laws relating to land and resources, particularly in the context of mining, have evolved in India over the past two hundred years. We identify here the legal framework governing mining projects, which is not a singular law, but a complex mesh of laws and overlapping legal regimes governing land, forests, mines and minerals, environment, air, water, hazardous waste among others, all caught up in oppositional forces of eminent domain and the right to autonomy. These legislations include: MMDR, FCA, FRA, PESA, EPA and EIA notifications, Air Act, Water Act, Hazardous Waste Rules etc.

Within this complex mesh of laws, statutes have the character of being broad framework legislations, delegating a high degree of authority to the executive to regulate these processes through Rules, Guidelines, circulars, notifications, policies, office memoranda etc. The statutes themselves offer little guidance on the processes, thus rendering imperative a compilation and study of executive instruments passed by the MoEFCC, Ministry of Adivasi Affairs etc. from time-to-time.

Further complicating this network of legislative and executive instruments, are judicial pronouncements, particularly in the case of *TN Godavarman* where the Supreme Court through the instrumentality of a continuing mandamus, also passed hundreds of orders relating to the day-to-day forest governance process through Court appointed committees.

This legal framework has witnessed significant overhauls over the past decade, accelerating during the COVID pandemic and continuing until today. While larger critiques of these reforms continue to be underway, undertaking both comparative analyses mapping the trajectories of amendments, as well as critiques regarding rights and environmental implications, the focus of our own endeavor is primarily descriptive. A descriptive focus is useful for practitioners, as it maps the step-by-step journey of legal processes in large extractive projects of this kind. This enables us not only to determine issues of legal and rights compliance of different projects, but also to clearly identify various avenues for representation and interventions by

Photograph by Rajaraman Sundaresan





Fundamental, Constitutional and Human Rights of *Adivasis* and Affected Communities

The Constitution of India, statutes, as well as a series of international human rights instruments recognize the inextricable relationship for adivasis between land and the right to autonomy and self-governance. In the Indian context, the President is vested with the power of declaring certain communities as ‘Scheduled Tribes’ (STs), entitled to affirmative action and special rights protection in governance. The administrative-legal category of ‘Scheduled Tribes’ has hence, been created. Using this category, the Constitution advances a layered understanding of individual and community rights. The rights range from self-governance, non-discrimination, to religious and cultural rights. To materialize the idea of self-governance and autonomy, the Constitution envisions Fifth and Sixth Schedule.

On similar lines, the international human rights discourse has taken note of the concerns of indigenous peoples. The United Nations Declaration on the Rights of Indigenous People (‘UNDRIP’) has been one of the most comprehensive instruments enlisting of the rights of adivasis. This includes rights such as self-determination, land, equality, etc. The International Labour Organization (‘ILO’) also have recognized the rights of indigenous peoples in its Indigenous and Tribal Peoples Conventions, C107 of 1957 and C169 of 1989. India has ratified the UNDRIP subject to certain reservations, and is a signatory to ILO C107.

In this chapter, we attempt to chart the various ways in which human, fundamental, and constitutional rights of adivasis are recognized and operationalized, along the following five pillars relevant to this study: (i) right to autonomy and self-governance; (ii) right to customary lands, forests, and resources; (iii) cultural and religious rights; (iv) socio-economic rights; and (v) right to environment and development. The discussion on each category takes into account

the source, content, and nature of the rights. This is followed by a discussion on the content of state obligation under each of these rights.

Right to Autonomy and Self-Governance

Fifth and Sixth Schedules of the Constitution of India grant differential rights with respect to certain areas. Schedule V dealing with areas having high indigenous population provides for special measures of governance, nominating the Governor as the head with the power to delimit the application of central and state laws in these areas. Similarly, Sixth Schedule deals with areas within the North-Eastern region of India. By creation of Autonomous District Councils and delegating limited legislative, executive, and judicial powers to them, the Schedule operationalizes the right to autonomy and self-governance. The Supreme Court in the landmark *Samatha v. State of Andhra Pradesh (Samatha)*, observed that “[t]he object of the Fifth Schedule and the regulation is to preserve Adivasi autonomy, their culture and economic empowerment to ensure social, economic and political justice for preservation of peace and good government in Scheduled Area”.⁴²

The devolution of self-governance powers to local bodies like the Panchayats culminated in the 73rd and 74th Constitutional Amendments in 1992, closely followed by the enactment of the Panchayat (Extension to Scheduled Areas) Act 1996. This is a model central legislation, following which states are asked to enact their own PESA recognized local self-government within Schedule Areas. The rights emanating from the legislation aim to enhance self-governance through customary laws and institutions in Scheduled Areas. Section 4 of the PESA forbids state Legislature from formulating laws which might be inconsistent with certain features. These features afford representation in decision-making to *adivasis*. Section 4(d) of the act says that every *Gram Sabha* shall be competent to safeguard and preserve the tradition and customs of the people, their community rights, and community resources, among others. Section 4(m) speaks of endowing Panchayats with such powers which “enable them to function as institutions of self-government”. Section 4(n), further, speaks of safeguards in such endowing of power which ensures that Panchayats at a higher level do not assume authority of Panchayats at a lower level or of the *gram sabha*. Several other powers are accorded

⁴² (1997) 8 SCC 191 [94].

to the *gram sabha* in respect of resource management which will be dealt with later in the Chapter.

In 2006, the Parliament enacted the Scheduled Tribes and Other Traditional Forest-Dwellers (Recognition of Forest Rights) Act, vesting individual and collective customary rights to forest lands and resources in ST and OTFD households and villages. Particularly, Section 3(1)(i) vests collective rights of protection, conservation and management of customary forest resources (CFR) in STs and OTFDs. Section 5 further states that the duty to protect, conserve, manage and regenerate customary forest resources vests in the *gram sabha*. This includes the right to protect forest resources, cultural rights of community, as well as the power to stop any activity destructive to rights and environment. The FRA is, thus, anchored in the historical imagination of the *gram sabha* as the customary institution with self-governance and decision-making powers over forest resources. The FRA is not limited only to Scheduled Areas, but extends to all forest lands across the country.

At the international level, a comprehensive account of indigenous autonomy and self-governance is found in the UNDRIP. Through Articles 3 and 4, it creates a base of self-determination, autonomy, and self-governance which acts as a foundation for the other rights enlisted therein. Article 3 asserts the unequivocal right of the indigenous peoples to self-determination, and consequently their freedom in determination of their political status as well as freedom in pursuit of economic, social, and cultural development. Article 4, building on the idea of self-determination recognizes the right to autonomy or self-governance which is a corollary of self-determination, as part of the structures of governance of an existing State or through their own institutions of governance. In terms of governance structures, the UNDRIP creates conditions for effective participation of indigenous peoples within decision-making to preserve autonomy. Indigenous peoples have a right to participate in decision-making that affects them in terms of Article 18. To ensure this participation, Article 20 provides for the right to maintain and develop political, economic, and social systems of institutions. While India voted in favour of UNDRIP, it continues to deny the presence of 'indigenous peoples' within its border, even though the Indian Constitution already encodes autonomy and self-governance for *adivasis* and STs.

In this matrix, the State bears the responsibility to respect, protect, and fulfil human rights. The autonomy and self-government of adivasis and indigenous peoples necessitates State recognition as well as incorporation of the rights into national legislations. The concepts and scope of recognition should emerge from mutual understanding and agreement between States and Indigenous Peoples.

Free, Prior, and Informed Consent

From the right to autonomy and self-governance emanates the right to free, prior, and informed consent (FPIC) in case the State seeks to appropriate customary lands and resources from indigenous peoples for whatever purpose. FPIC moves beyond simply *consulting adivasis* or indigenous peoples regarding decision-making on resource allocation for development and environmental purposes to *actively seeking their consent*. Consultations imply that *adivasis* are one among several stakeholders whose perspective must be accounted for in determining developmental priorities. FPIC, on the other hand, protects the rights of *adivasis* and indigenous peoples to grant or refuse their assent to developmental priorities determined by national-level structures as they pertain to their customary lands and resources over which they have historical rights.

Within the national legal framework, several Indian statutes operationalize these differential consent and consultation standards. For example, under PESA, consultation with the *gram sabha* is required before acquiring lands for any development activity, and before granting licenses or leases for mining in Scheduled Areas. Section 3(1)(i) of FRA secures the right of STs and other traditional forest dwellers to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use. Section 5 FRA, further, empowers the *gram sabha* as the decision-making authority for protection and conservation of customary forest resources. In *Orissa Mining Corporation v. Ministry of Environment and Forests* (the *Niyamgiri* judgment), the Supreme Court in 2013 upheld this right of *gram sabha* as the ultimate decision-making authority relating to customary forests, in which STs and OTFDs enjoy customary rights.⁴³ This, by implication, recognizes the right to free, prior, and informed consent, as also recognized in the Forest Conservation Rules, including the ones passed on 2023. Consent proceedings may not be treated

⁴³ Orissa Mining Corporation Ltd. (n 22) [60].

as a routine check-list item, but the State must take all endeavours to ensure that the consent process enables free and autonomous decision-making by rightsholders, one that is free of any form of coercion, duress, threats, or intimidation. The State must ensure that rightsholders have access to all relevant information regarding the project, in the local language, that could influence their decision-making. Finally, consent must be obtained *prior* to, or before, such projects are set in motion, and not *post facto*, or at such a belated stage that the project has gained *fait accompli*.

Separately, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 (LARR Act) also encodes mandatory consultation proceedings in the form of public hearings with affected communities, as well as consent of individual households in the acquisition of their property. The Act recognizes that consent of local representative body must be sought.⁴⁴

This standard is entrenched in various international instruments and guidelines, illustrating a global commitment to protecting the rights of Indigenous peoples. These instruments include the UNDRIP, ILO C107, and ILO C169. UNDRIP reinforces the standard of FPIC. It prohibits the forced removal of Indigenous Peoples from their lands and mandates states to obtain FPIC before implementing legislative and administrative measures affecting these communities.⁴⁵ ILO C107, adopted in 1957, marks one of the early international recognitions of the rights of Indigenous Peoples, including their right not to be removed without consent from their territories. Building on this, ILO C169 in 1989 stressed that indigenous peoples should not be arbitrarily displaced from their lands.

Right to Customary Lands, Forests, and Resources

Adivasis and indigenous peoples have rights to their customary lands, forests and resources. A holistic reading of the constitutional provisions⁴⁶ suggests an inseparable link between Part III, and Parts IX and X which is related to local self-governance and administration of Tribal and Scheduled Areas. The Fifth and Sixth

⁴⁴ The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 ('LARR'), s.41(3).

⁴⁵ United Nations, United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP'), 2007, Article 10, 11(2), 19, 28.

⁴⁶ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

Schedules, emerging from Article 244 in Part X, provide for the autonomy of customary institutions and primacy to customary laws in matters relating to land and forests either through the specific demarcation of Scheduled Areas, Tribal Areas etc., or generally wherever there is a high density of *adivasi* populations. Part IX of the Constitution also aims to achieve the same goals through devolution of decision-making authority to local units of self-governance for those not formally recognized as Scheduled Tribes or Scheduled Areas.⁴⁷ This element of state obligation to respect customary rights have also been recognized under the UNDRIP. Article 26 of the UNDRIP places obligation upon the State to give legal recognition and protection to lands to which Indigenous peoples have customary rights. Recognition herein has to be respectful of the customs, traditions, and land tenure systems of the Indigenous peoples.

Under the Fifth Schedule, the Governor has the power to make regulations prohibiting the transfer of land by the members of the ST communities within Scheduled Areas.⁴⁸ In pursuit of this, several states with scheduled areas have enacted legislations prohibiting the transfer of land to non-*adivasis*. In Odisha, this is called the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation of 1956 ('Orissa Regulation of 1956'). In *Samatha*, the Supreme Court held that the prohibition of land alienation in Scheduled Areas also encompasses land acquisition by state and private corporations.⁴⁹ Further, Section 41(1) of the LARR mentions that as far as possible, no acquisition of land shall be made in the Scheduled Areas. Section 41(2) mentions that such acquisition should be undertaken only as a measure of last resort. Article 19(5) of the Constitution also permits reasonable restrictions on the freedom of movement if it interferes with the right of *adivasis* to their land and resources in Scheduled Areas.

The legislative framework features the recognition of customary lands and rights to forest and resources. The FRA recognizes both individual and collective rights of STs and other traditional forest-dwelling communities not captured within the administrative category of STs. These rights include the right to household cultivable land and homestead, right to collection of forest produce, right to use and access forest and water commons, right to grazing lands, among others. Under

⁴⁷ Chitkara & Pareek (n 32).

⁴⁸ The Constitution of India 1950, Fifth Schedule, Para 5.

⁴⁹ *Samatha* (n 42).

Sections 3(1)(i) and 5, it also includes the right to community forest resources and the right of *gram sabhas* over decision-making in relation to customary forest resources for their use and conservation. Section 4(5) states that no rights-bearer shall be evicted or removed from the forest land unless the recognition and verification procedure is completed. Pertinently, the process of rights recognition under FRA is anchored in customary institutions such as the *gram sabha*, with the power to initiate the claims process, undertake mapping of customary resources, collect and verify claims etc.

The LARR prescribes a general law for land acquisition. The purpose of LARR is to ensure, in consultation with institutions of local self-government and *gram sabhas*, a humane, participative, informed, and transparent process for land acquisition along with just and fair compensation. However, special provisions are made in the LARR with respect to SCs and STs. Sections 41(1) and 41(2) makes acquisition of land within Scheduled Areas permissible only in cases of last resort. When such acquisition is to take place, prior consent of the local representative body must be sought.⁵⁰

The UNDRIP acknowledges the historic injustices perpetrated on indigenous peoples under colonialism, a prime feature of which was dispossession of indigenous peoples from their traditionally-held lands. Article 10 provides for a right against forceful dispossession. Article 26, recognizes the right to customary lands, territories, and resources. It goes further to recognize the right of indigenous peoples to own, use, develop, and control the lands and resources. ILO C169 also recognizes the right to lands, territories, and resources. Article 14 ILO C169 recognizes the rights of ownership and possession over lands ensuing from traditional occupation. Rights relating to the natural resources pertaining to the lands are also recognized in Article 15. As a measure of safeguard, Article 18 provides for imposition of penalties in case of unauthorized intrusion upon or use of customary lands.

The United Nations Permanent Forum on Indigenous Issues, since its establishment in 2000, has repeatedly called upon States to take effective measures to halt land alienation in indigenous territories, provide financial and technical assistance for indigenous people to map the boundaries of their communal land,

⁵⁰ LARR (n 44) s.41(3).

finalize legal and policy frameworks for the registration of collective titles, and adopt national legislations with the principle of free, prior and informed consent of indigenous people when involving their territories, lands and natural resources.

Cultural and Religious Rights

The Constitution of India specifically recognizes the freedom of religious and cultural beliefs and practices in Article 25-26. Further, Article 29 provides the right of religious, linguistic, and cultural minorities to protect their distinct language, script, or culture. These fundamental rights apply equally to *adivasi* communities. In the *Niyamgiri* case, the issue of customary and religious rights was also agitated. The Supreme Court held that the fundamental right to religious and cultural freedom under article 25 and 26 of the Constitution of India does not only guarantee them the right to practice and propagate matters of faith or belief, but all those ritual and observations which are regarded as integral part of their religion. In this case, this right and the protection, therein, extended to the right to worship the deity Niyam-Raja, believed to reside in the hills in their customary forests.⁵¹ The Sikkim High Court reiterated this principle in *Chewang Pintso Bhutia v. State of Sikkim and Ors.*⁵² It highlighted that merely non-notification of a place as sacred by the state government cannot be a determining factor in deciding whether a place is sacred or not. The relevant factor in such determination is the belief and faith of the people and the practice which is considered as essential to their faith.⁵³ In terms of the governance structure engendered by Sixth Schedule, the District and Regional Councils have powers to legislate on social customs.⁵⁴ These are necessarily both individual and collective rights.

In the statutory context, FRA also gave recognizes the traditional rights of STs and OTFDs to religious and cultural practices relating customary forest lands and resources. Section 5 of the FRA, empowers the *gram sabha* to protect and manage community forest resources, safeguarding the cultural practices, traditions, and religious customs of the forest-dwelling communities. PESA covers the issues of preservation of religion and culture through the lens of self-governance. Section

⁵¹ *Niyamgiri* (n 22) [55].

⁵² AIR 2014 (NOC) 596 (SIK.).

⁵³ *ibid.*

⁵⁴ The Indian Constitution (n 48), Sixth Schedule, para 3(1)(j).

4(d) empowers *gram sabhas* to “safeguard and preserve the traditions and customs of the people, their cultural identity...”. Also, Section 4(a) requires that State legislations need to be in consonance with the customary law, social and religious practices of the communities.

ILO C107 in Article 4 cautions State Parties so that they take due account of cultural and religious values while applying the Convention to issues of ‘integration’.⁵⁵ ILO C169 takes a stronger tone requiring respect for religion and culture of indigenous peoples as long as it is compatible with human rights and nationally relevant fundamental rights.⁵⁶ UNDRIP, in Article 8, provides for the right of indigenous peoples against the destruction of their culture. Article 11, in a positive formulation, recognizes the right of Indigenous communities to practice and revitalize their cultural traditions and customs. This includes a right to maintain, protect, and develop their culture. Article 12 provides for similar right to manifest, practice, develop, and teach with respect to their spiritual and religious



(Photograph by Rajaraman Sundaresan)

⁵⁵ Shomona Khanna et al, *India and the Rights of Indigenous Peoples* (AIPP 2010) 81.

⁵⁶ *Indigenous and Tribal Peoples Convention, 1989* (No. 169), Art. 8(2).

traditions.

Socio-Economic Rights

The right to life under Article 21 of the Constitution of India read with the Directive Principles of State Policy recognize key socio-economic rights. These include the right to housing,⁵⁷ right to work and livelihood,⁵⁸ right to health,⁵⁹ right to nutrition and food security,⁶⁰ etc.

The right to housing under the International Covenant on Economic, Social and Cultural Rights 1966 ('ICESCR') read with the UNDRIP extends beyond simply the provision of shelter and accommodation for individuals and households. The ICESCR recognizes the right to adequate housing under Article 11, and the UDHR under Article 25, requiring security of tenure, protections against unlawful evictions and displacement, and equal access to vulnerable groups such as women, indigenous peoples etc. It also requires State parties to ensure adequate housing respecting cultural practises and ways of living of individuals and communities.⁶¹ For indigenous peoples specifically, the right to housing is encompassed within the larger right to land and customary resources, where respect for cultural practices and ways of living require States to ensure *in situ* habitation of indigenous peoples to and ensure cohesiveness of communal bonds.⁶²

On the right to health, Article 12 of the ICESCR recognizes the right of all to the highest attainable standard of health, whether physical or mental. For indigenous peoples specifically, Article 24 UNDRIP recognizes the right to their traditional medicines, to maintain their health practices, among others. The United Nations Department of Economic and Social Affairs further underlines the relationship between the right to health, and the right to lands and self-governance, noting that the displacement of indigenous peoples from their customary lands and the

⁵⁷ *Olga Tellis & Ors v. Bombay Municipal Corporation & Ors.*, 1985 (3) SCC 545.

⁵⁸ *ibid.*

⁵⁹ *Bandhua Mukti Morcha v. Union of India & Ors.*, 1992 AIR 38.

⁶⁰ *PUCL v. Union of India*, WP(C) 196 of 2001, Order dt. 28 December 2001; 'Right to Food' (4th edn., Human Rights Law Network, 2009); Christian Courtis, 'The Right to Food as a Justiciable Right: Challenges and Strategies' in A von Bogdandy and R Wolfram (eds) (2007) 11 Max Plank Yearbook on United Nations Law 317.

⁶¹ Committee on Economic, Social and Cultural Rights, General Comment No.4 on the Right to adequate housing (1991); Committee on Economic, Social and Cultural Rights, General Comment No.7 on forced evictions (1997).

⁶² United Nations Housing Programme, *Indigenous Peoples' Right to Adequate Housing: A Global Overview*, (2005).

accompanying fragmentation of communities is responsible for numerous mental health concerns. The Department also notes the particular threats to health and nutritional security accompanying large projects on indigenous lands resulting from toxic chemicals and wastes.⁶³

Secure tenure of agricultural and cultivable land is also crucial to the livelihoods of indigenous peoples, particularly as protection against forced migration and exploitative work. Illustratively, Article 23 prohibits the practice of *begar* or forced labour generally. However, the particular proclivity of colonialism and casteism to drive *adivasis* into exploitative work conditions through economic coercion is well recorded.⁶⁴ A recognition of additional special measures needs to be present considering the vulnerable nature of the community. This recognition of special measures is present within ILO C169. With respect to recruitment and conditions of employment, the Convention calls for regulations to effectively protect Indigenous peoples within employment to the extent that protective laws applying to workers generally may be inadequate.⁶⁵ Other specific protections regarding coercive recruitment, equality of treatment, conditions of employment are also mentioned.

Further, PESA also provide for protection of certain socio-economic rights. Section 4(d) ensures preservation of traditions, customs, etc. Livelihood of *adivasis* is also ensured by the recognition of a swathe of forest rights under the FRA 2006, such as the right to minor forest produce under Section 3(1)(c), which, in addition to agriculture, is integral to livelihoods of *adivasi* households.

Article 27 ICCPR further provides that ethnic, religious, or linguistic minorities should not be denied right to culture, religion, and language.⁶⁶

State obligation for socio-economic rights, in international law, has been one of progressive realization and non-regression. This implies that limitations on financial and other State resources does not excuse non-compliance with socio-

⁶³ 'Health', United Nations Department of Economic and Social Affairs, *available at* <<https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/health.html>>.

⁶⁴ David Mosse *et al*, 'Brokered Livelihoods: Debt, Labour Migration and Development in Tribal Western India' 38(5) *Journal of Development Studies* 59 (2002).

⁶⁵ ILO C169 (n 56), Art. 20.

⁶⁶ International Covenant on Civil and Political Rights 1966, Art. 27; Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2009) 151.

economic rights, but that these must be secured progressively through law and policy. Non-regression requires that the State must refrain from acts and omissions that take away rights that peoples used to enjoy, for instance, forced displacement enacts a regression on the right to housing of indigenous peoples.⁶⁷

Right to Environment and Development

Neither the right to development nor the right to environment are explicitly placed within the Indian Constitution. However, with reference to the fundamental right to life, both have been read into Article 21. Through successive pronouncements, the Supreme Court has solidified this understanding. In *Rural Litigation and Entitlement Kendra v. State*,⁶⁸ the right to healthy environment was read into Article 21. Further, in *MC Mehta v. Union of India*,⁶⁹ the right to live in a pollution-free environment was recognized. In judgements such as *Vellore Citizens Welfare Forum v. Union of India* (*Vellore Forums* case) the ‘Precautionary Principle’ as well as the ‘Polluter Pays Principle’ have been deployed.⁷⁰ In the *Taj Trapezium Case*, the court also recognized the principle of Intergenerational Equity.⁷¹ Through such pronouncements, the Judiciary has not only affirmed a right to environment under the Constitution, but has also created conditions for its pragmatic operationalization. Along with inclusion of right to environment under Article 21, Judiciary has also appreciated the delicate balance between development and environment in terms of ‘sustainable development’.⁷² The enumeration of environmental protection in a statutory form in the EPA, 1986 was triggered by the Bhopal Gas Leak. This act provides the framework of modern Indian environmental law.⁷³

While considering the question of environment, forests find a special mention within statutes. On the one hand, they have religious and livelihood significance

⁶⁷ Clarence J. Dias, ‘Progressive Realization and Non-Regression’, ESCR-Net, available at <<https://escr-net.org/resources/progressive-realisation-and-non-regression>>.

⁶⁸ AIR 1988 SC 2187.

⁶⁹ AIR 1987 SC 1086.

⁷⁰ (1996) 5 SCC 647.

⁷¹ M.C. Mehta v. Union of India, AIR 1997 SC 734.

⁷² Goa Foundation, Goa v. Diksha Holdings Pvt. Ltd., AIR 2001 SC 184.

⁷³ Shyam Divan & Armin Rosencranz, *Environmental Law and Policy in India*, (Oxford University Press 3rd edn, 2022) 880-881.

for *adivasis*; on the other hand, they hold economic value for the State and are considered indispensable for national development. The rhetoric of development has dominated discourse.⁷⁴ However, a crucial turning point is introduced by the FRA. In addition to enumerating several rights, it also worked towards creating a foundational democratic framework for forest governance and conservation.⁷⁵ It provides for right of self-governance, access, use, and dispose of minor forest produce.⁷⁶ The right is of immense importance as several *adivasi* communities depend on minor forest produce for their livelihood. It also provides for a right to protect, regenerate, conserve, or manage any community forest resource which has been traditionally protected and conserved for sustainable use.⁷⁷ One of the main threats to environment and forests on and in vicinity of *adivasi* lands is mining. Detailed procedure for mining is provided in statutes such as MMDR Act, however, these provide almost no avenues to represent concerns of affected communities.⁷⁸

The UNDRIP considers questions of both development and environment. The Declaration recognizes a right to conservation and protection in terms of environment. It also features a negative injunction with respect to presence of hazardous substances within the environment. The connection between environment and development, usually explained as sustainable development is also recognized within the recital to the Declaration. Further, in terms of development, it affirms the priority of indigenous peoples, their knowledge, and traditional practices. Climate change is a special area which has been addressed by international law at length. Several studies have attempted to affix responsibility of climate change to nation-states.⁷⁹ It has been recognized in these studies that while Indigenous communities contribute marginally to climate change, they are uniquely

⁷⁴ Amita Baviskar, 'Nation's body, river's pulse: Narratives of anti-dam politics in India' 150(1) Thesis Eleven, (2019) 26, 28 – characterization of groups using developmental narratives as producer patriots while vulnerable communities become sacrificial victims.

⁷⁵ *Khanna* (n 55) 95.

⁷⁶ Schedules Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 ('FRA'), s.3(1)(c).

⁷⁷ *ibid*, s.3(1)(i).

⁷⁸ *Khanna* (n 55) 98.

⁷⁹ Jason Hickel, 'Quantifying national responsibility for climate breakdown: an equality-based attribution approach for carbon dioxide emission in excess of the planetary boundary' 4(9) *The Lancet: Planetary Earth* 399 (2020).

vulnerable to its impacts.⁸⁰ Therefore, in light of a common-but-differentiated-responsibility principle, the Paris Agreement in its recital recognizes that domestic attempts to address climate change should not prejudice human rights, especially of vulnerable communities like indigenous groups.⁸¹ One can also see similar commitments in ILO C169 where protection and preservation of environment are provided for. Article 4 of the Convention emphasizes the need for special measures *inter alia*, in the context of environment. Like UNDRIP, the Convention also accords primacy to the priorities and strategies of the Indigenous peoples for development.

The right to environment being read into Article 21 of the Indian Constitution leads to adoption of the individualistic framework in which the provision operates. It recognizes a person as a rights-bearer. However, international human rights commitments which caution climate change action or development do so in terms of rights of vulnerable groups and minorities. The rights discussed above under UNDRIP and ILO Convention also couch the rights in a collective framework.

State obligations with respect to right to environment flow from both the Constitution and judicial pronouncements. In Part IV of the Indian Constitution, specific obligations are casted on the State regarding environment. Article 48A states that State has to endeavour to “protect and improve environment” and to “safeguard the forests and wildlife of the country”.⁸² Further, in cases of right to environment and development under Article 21, the Judiciary has played an active role, sometimes even assuming a monitoring role. The *TN Godavarman Thirumulpad v. Union of India (TN Godavarman)* case is one of the longest cases where the Supreme Court has been monitoring the implementation of right to environment within statutory framework through continuing mandamus.⁸³ Further, The Constitution also provides for obligations of citizens with respect to environment in Article 51A (Fundamental Duties). The Constitution of India mentions a

⁸⁰ Sven Harmeling, ‘Climate Change Impacts: Human rights in climate adaptation and loss and damage’ in Sébastien Duyck, Sébastien Jodoin, and Alyssa Johl (eds) *Handbook of Human Rights and Climate Governance* (Routledge 2018) 90; Kriswtn Dow, Roger E Kasperon, & Maria Bohn, ‘Exploring the Social Justice Implications of Adaptation and Vulnerability’ in W Neil Adger, Jouni Paavolva, Saleemul Haq, MJ Mace (eds) *Fairness in Adaptation to Climate Change* (MIT Press 2006) 82.

⁸¹ Recital 11; Cancun Agreements as cited in Lavanya Rajamani, ‘Integrating Human Rights in the Paris Climate Architecture: Contest, Context, and Consequences’ 9 *Climate Law*, (2019) 180, 181.

⁸² The Indian Constitution (n 48), Art 48A.

⁸³ *TN Godavarman Thirumulpad v. Union of India*, (1997) 2 SCC 267.

fundamental duty to “protect and improve” the natural environment. The hinderance posed by the unenforceable nature of both Article 48A and 51A(g) has been addressed by Judiciary through another feat of interpretation. In cases such as *Shri Sachidanand Pandey v. State of West Bengal*, the Supreme Court has read these provisions together to provide content to the right to environment and development under Article 21.⁸⁴

Hence, the right to environment and development mainly emanates from the Constitution and is supported by judicial precedents along with statutory and international human rights law framework. Further, the nature of rights is largely individualistic. Constitution imposes specific obligations with respect to environmental protection on both State and citizens.

Human Rights Obligations of Businesses

Human Rights obligations are also imposed on businesses as non-state actors by virtue of the United Nations Guiding Principles on Business and Human Rights (‘UNGP’ hereafter). UNGP consists of three pillars: the state’s duty to protect human rights, the corporate responsibility to respect human beings, and access to remedies for affected parties. The principles stress due diligence, transparency, and accountability, aiming to harmonize business success with human rights.

Several UNGP principles are important in this regard. Principle 11 underscores the imperative to uphold the human rights of all stakeholders, including right to life, health, water, land, culture, and participation. Principle 13 advocates for efforts aimed at averting or mitigating adverse human rights impacts. Moreover, Principle 15 underscores the necessity for policy commitments to human rights, accompanied by robust due diligence and redressal mechanisms. Commercial enterprises are duty bound to undertake due diligence, as outlined in Principle 17, and incorporate the results of impact assessments, as stipulated in Principle 19. Additionally, the duty of businesses to publicly disclose their efforts in mitigating the impact on human rights is stressed upon, as per Principle 21, while ensuring compliance with both domestic and internationally applicable laws, as outlined in Principle 23.

⁸⁴ AIR 1987 SC 1109.

This chapter's discussion illuminates the multifaceted nature of *adivasi* rights, which is derived from various sources and entail distinct characteristics. Central to these rights is the notion of land ownership, autonomy, and self-governance. These rights intersect with both state and non-state obligations, highlighting the intricate web of responsibilities surrounding the protection and promotion of *adivasi* rights.



Photograph by Rajaraman
Sundaresan



Principles of Environmental Governance

Article 48A of the Constitution of India states that “The State shall endeavor to protect and improve the environment of the country [...]”. Further, Article 51 (A) (g) asserts that “every citizen of India has a fundamental duty to protect and improve the natural environment [...]”.

The global threat of climate change, environmental degradation, loss of livelihoods and human rights violations accompanying polluting businesses, has ensured a burgeoning regime of environmental governance both at the domestic and international levels. According to this, the State has an obligation to ensure the protection of environment and natural resources, and its sustainable use for future generations. Internationally, instruments such as the Stockholm Convention of Persistent Organic Pollutants, 2001 or the Rio Declaration on Environment and Development, 1992 establish certain key principles of environmental governance in order to produce a blueprint for international action on environmental issues to help guiding international cooperation. This section describes these key principles which are meant to guide states, legal systems, and relevant authorities in the discharge of their constitutional and international obligations towards sustainable development.

Polluter-Pays Principle

By issuing the Guiding Principles Concerning the International Economic Aspects of Environmental Policies 1972, the Organisation for Economic Co-operation and Development (OECD) gave the initial rise to the Polluter-Pays Principle.⁸⁵ Universal acceptance and application was, however, internationally first received

⁸⁵ OECD, Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies, OECD/LEGAL/0102, pp. 4-5.

through its implementation in the Rio Declaration 1992.⁸⁶ Also, it is the key element of the EU's environmental policy (see Article 191(2); 174(2) of the 2007 TFEU).⁸⁷ Domestically, the Polluter-Pays principle was also acknowledged by the Supreme Court in *Indian Council for Enviro-Action v. Union of India*.⁸⁸

The primary goal of the Polluter-Pays Principle is to minimize environmental impacts in the global economy. Its objective focuses on rationalizing the use of scarce environmental resources and diminishing harmful pollution. The principle suggests that the polluter and user of natural resources shall shoulder the costs for preventing and controlling pollution measures as well as the damages that are being inflicted by its conduct.⁸⁹ By doing that the principle attempts to incentivize the polluters to avoid behavior that is detrimental to the environment.⁹⁰

To effectively apply the Polluter-Pays Principle, it is evidentially necessary to define who should be deemed as a polluter. The OECD defined a polluter as “*the person who directly or indirectly causes deterioration of the environment or establishes conditions leading to its deterioration.*”⁹¹

The principle's goal should be obtained by leveraging market mechanisms for sustainable development purposes such as incorporating environmental costs into the final product prices, which then adequately takes the environmental deterioration in the price market into account.⁹² To establish the implementation of the principle, methods such as taxes, environmental standards, user fees, and

⁸⁶ Sumudu A. Atapattu, *Emerging Principles of International Environmental Law* (2006) 439; Rio Declaration (n 38).

⁸⁷ ‘The Polluter Pays Principle: Inconsistent application across EU environmental policies and actions’ European Court of Auditors, 2021, *available at* <[https://op.europa.eu/webpub/eca/special-reports/polluter-pays-principle-12-2021/en/#:~:text=Conclusions%20and%20recommendations,-69&text=The%20Polluter%20Pays%20Principle%20\(PPP\)%20underlies%20the%20EU's%20environmental%20policy,costs%20it%20imposes%20on%20society](https://op.europa.eu/webpub/eca/special-reports/polluter-pays-principle-12-2021/en/#:~:text=Conclusions%20and%20recommendations,-69&text=The%20Polluter%20Pays%20Principle%20(PPP)%20underlies%20the%20EU's%20environmental%20policy,costs%20it%20imposes%20on%20society)> p. 8.

⁸⁸ *Indian Council for Enviro-Action v. Union of India*, (1996) 2 JT (SC) 196.

⁸⁹ Sumudu A. Atapattu, (n 86) p. 438.

⁹⁰ The Polluter Pays Principle (n 87) p. 4.

⁹¹ OECD, *The Polluter-Pays Principle*, OECD Analyses and Recommendations (1992), OCDE/GD (92) 81, p. 8.

⁹² Matthieu Leimgruber, Matthias Schmelzer, *The OECD and the International Political Economy Since 1948* (2017) 326-327; OECD, *Recommendation of the Council on Guiding Principle concerning International Economic Aspects of Environmental Policies*, OECD/LEGAL/0102, p. 4.

green auditing are being utilized.⁹³ This ideally encourages environmentally friendly practices and discourages pollution.

Despite its good intentions and promising objectives, implementing the Polluter-Pays Principle faces various hurdles. While implementing the Polluter-Pays principle, difficulty arises in ascertaining how damages are to be calculated. The National Environment Tribunal Act, 1995 provided heads under which compensation for damages may be claimed, under the Schedule annexed with the act. This act was repealed by the National Green Tribunal ('NGT') Act of 2010. However, the NGT Act reproduced the earlier schedule, in its original form, as Schedule II of the act. This may provide some guideline with respect to damages under the said principle.

Further, when it comes to setting the criteria for imputing liability in cases of strict liability, or absolute liability, there is a challenge under international environmental law in properly defining environmental damage and then computing liability thereon.⁹⁴ This issue goes along with the challenge of defining environmental damage commonly, since international environmental law is mostly founded on a voluntary basis, which ultimately leads to different interpretations and divergence of environmental damages assessments.⁹⁵ While international law lacks mechanism to impute strict liability, the Public Liability Insurance Act ('PLIA'), 1991 was created to provide immediate relief to the victims of an accident involving hazardous substance. The act imposes 'no-fault liability' upon the owner of the hazardous substance and requires them to compensate the victims, irrespective of any neglect or default on their part.⁹⁶

It is further troublesome to effectively determine appropriate forms of reparation. For instance, detrimental conducts that ultimately lead to extinction of species may physically never be possible to restore, and cannot be adequately computed through compensations. On the other hand, cases of harm that can be repaired may face issues such as economic concerns or imbalances between involved costs and desired results that eventually will also conclude in the lack of equitable and

⁹³ Sumudu A. Atapattu, (n 86) p. 457.

⁹⁴ Max Valverde Soto, 'General Principles of International Environmental Law', 3 ILSA J. INT'L & COMP. L. 193 (1996), p. 203.

⁹⁵ *ibid*, p. 204.

⁹⁶ *Divan & Rosencranz* (n 73) 88.

precise reparation.⁹⁷ Thus, these hurdles make it very difficult to curtail damages to the environment through the Polluter-Pays principle.

The Precautionary Principle

The Precautionary Principle has been integrated into numerous international instruments. While it constitutes a key element in the EU's environmental protection policy (Maastricht Treaty, 1992) as well as globally in the Stockholm Convention of Persistent Organic Pollutants (2001), at the global level, the Precautionary Principle is predominantly reflected in the Rio Declaration on Environment and Development (1992).⁹⁸

Principle 15 of the Rio Declaration declares that “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”⁹⁹ In other words, the Precautionary Principles address issues that are unpredictable with present scientific knowledge and obligates to take anticipatory measures within this scientific uncertainty, preventing potential hazards and environmental destruction.¹⁰⁰ Thus, the essence and expected outcome of this principle is to prevent harm before it occurs rather than needing to act in hindsight.

Domestically, India has accepted the Precautionary Principle as a fundamental tool and incorporated it into Indian governance to improve health and environmental decisions.

The Supreme Court plays a substantial role in the recognition of the precautionary principle in numerous cases.¹⁰¹ While the Precautionary Principle has played a role in cases such as the *M.C Mehta v. Union of India*¹⁰² or the *A.P. Pollution Control Board*,¹⁰³ the *Vellore Forum*¹⁰⁴ case has predominantly domesticated the principle in

⁹⁷ *ibid.*

⁹⁸ Sumudu A. Atapattu, (n 86) pp. 208-209.

⁹⁹ *Rio Declaration* (n 38) Principle 15.

¹⁰⁰ Sumudu A. Atapattu, (n 86) pp. 203-206; Dennis Oghenerobor, *Application of the Precautionary Principle in International Trade: Implications and Legal Perspectives* (PhD thesis, Universität zu Köln 2020), p.25.

¹⁰¹ Devendra Shaligram & Suyash Bansal, 'Precautionary Principle and Its Application in Indian Judiciary' 5 *Int'l J.L. Mgmt & Human* 42, (2022) p. 421.

¹⁰² *M.C Mehta* (n 69).

¹⁰³ *Andhra Pradesh Pollution Control Board v. MV Nayudu* (1999) 2 SCC 718.

Indian judgements, which leads to frequent applications of the principle.¹⁰⁵ With this case the Supreme Court declares that State government and statutory authorities must “[...] *anticipate, prevent and attack the causes of environmental degradation*”.¹⁰⁶ It further adopts the notion of Principle 15 of the Rio Declaration and promotes the shifting of the burden of proof such that the burden to prove harm does not lie on the entity alleging that an activity will be polluting, but instead, on the entity that intends to use the resources for their own purposes.¹⁰⁷ Moreover, the Supreme Court asserts that the Precautionary Principle is adequately represented in India’s environmental law, since it serves as a major factor in Article 21 of the Constitution of India, which guarantees protection of life and personal liberty, and the aforementioned constitutional provisions under Article 48A and 51A (g) that constitute the improvement and protection of the environment.¹⁰⁸ Next to these constitutional provisions, other statutory regulations such as The Water (Prevention and Control of Pollution) Act 1974, The Air Act (Prevention and Control of Pollution) Act 1981, and the Environmental Protection Act 1986 serve the purpose of protecting the environment, which is at the heart of the Precautionary Principle. The Precautionary Principle under Indian law is operationalized under the EIA Notification 2006, which is discussed in detail in the next chapter.¹⁰⁹

Further, the Precautionary Principle (and Polluter-Pays Principle) has been incorporated in the National Green Tribunal Act 2010. Section 20 in The National Green Tribunal Act denotes expresses that “*The Tribunal shall, while passing any order or decision or award, apply [...] the precautionary principle and the polluter pays principle*”.

In order to effectively apply the Precautionary Principles, several components create a guiding framework. Next to the core component of taking *Precautionary Actions before Scientific Certainty of Cause and Effect*, by *Setting Goals* it is crucial to firstly establish clear, forward-looking objectives to provide a directive purpose for

¹⁰⁴ Vellore Citizens Welfare Forum (n 70).

¹⁰⁵ *Shaligram & Bansal* (n 101) p. 421.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

precautionary actions, so these measures come to fruition most effectively.¹¹⁰ As a third component, *Seeking out and Evaluating Alternatives* is evidential for attaining such goals. This involves an identification and assessment of alternative strategies through comparing other sites, technologies, or practices, which could prevent or mitigate potential environmental deterioration.¹¹¹

Moreover, exercising the Precautionary Principle requires a *Shifting of the Burden of Proof*. Those who claim that a certain action is harmful usually bear the burden of proof, however, the Precautionary Principle reverses that burden, so the one who advocates for an activity or certain policy is obligated to demonstrate that the activity will not cause environmental damage.¹¹² This obligation opposes the disadvantage of the traditional approach, where preventive actions take only place when proof of harm is established, or when damage has already occurred.¹¹³ Thus, while proving that an action is safe and does not create harm often appears to be difficult, in cases of uncertainty the shifting of the burden of proof frequently stops an activity from proceeding.¹¹⁴

The component for *Developing More Democratic and Thorough Decision-Making* ensures that all affected parties, such as the public, stakeholders and communities that are impacted by detrimental actions have a right to be involved in decision-making, that pertains to them.¹¹⁵

These components secure an inclusive, responsible, and proactive approach and implementation of the Precautionary Principle that seeks for a preventive environmental management.

The Public Trust Doctrine

The Public Trust Doctrine constitutes a fundamental principle in environmental law, which has been re-invented and developed by Joseph Sax, who denotes the public trust as a public right that obligates the government to act in its citizen's

¹¹⁰ Joel Tickner, Carolyn Raffensperger & Nancy Myers, *The Precautionary Principle in Action: A Handbook* (1st ed. 1999), 4.

¹¹¹ *ibid.*

¹¹² *Sumudu A. Atapattu*, (n 86) pp. 207; *Tickner* (n 110), 4.

¹¹³ *Tickner* (n 110), 1.

¹¹⁴ Daniel Bodansky, Deconstructing the Precautionary Principle, in Caron, D.D. & Scheiber, H.N. (eds), *Bringing New Law to Ocean Governance*, p. 390f.

¹¹⁵ *ibid.*

interest.¹¹⁶ It holds that the State holds natural resources not as owners but as trustees, with the responsibility to protect and prevent any kind of depletion or destruction. As the designated trustee, the State plays an active role in managing the natural resources for the benefit and use of the public as well as future generations.¹¹⁷

While balancing economic development with environmental protection, it is the duty of the State to safeguard certain resources that through their nature are crucial and inherent to the public.¹¹⁸ These natural resources are the ones that by nature are meant for public use and enjoyment such as air, water, forests, and wildlife and thus form such utter significance to the people, making it inevitable to preserve and protect it from excessive private ownership and exploitation, so the sovereign holds this preservation in trust for the people.¹¹⁹

The Public Trust Doctrine is internationally very influential in environmental law and policies, so its principles have been incorporated into various universal instruments such as the United Nation's Convention on the Law of the Sea (UNCLOS). The doctrine also has domestically been influential, for instance the Supreme Court of India promotes to adhere to the doctrine's substance. In *M.C. Mehta* case, the Supreme Court of India highlighted the importance of an environmental preservation of natural resources through the Public Trust Doctrine.¹²⁰

In conclusion, the Public Trust Doctrine constitutes a legal principle to guide governments in preserving national resources by calling for proactive measures that ensure the state's actions are conducted in the interests of public and future generations.

¹¹⁶ Joseph L. Sax, 'The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention', 68 MICH. L. REV. 471 (1970), 478.

¹¹⁷ *ibid*, 477-478.

¹¹⁸ *ibid*, 484; Patricia Kameri-Mbote, 'The Use of the Public Trust Doctrine in Environmental Law', 3 LAW ENV't & DEV. J. 195 (2007), 197-198.

¹¹⁹ *ibid*.

¹²⁰ *M.C. Mehta* (n 69).



Legal Framework Governing Mining Projects in India

The chapter attempts to provide a brief layout of necessary statutory provisions which govern the process of mining beginning from the allotment of mining lease to land acquisition. This chapter identifies the essential approvals, permissions, and guidelines under the relevant statutes which the project proponent needs to comply with as a part of obtaining various clearances such as environmental clearance, forest clearance, wildlife clearance, and pollution clearance. This chapter undertakes a detailed assessment of these clearances by perusing the applicable laws, regulations, and rules provided by the central and state government. The chapter is crucial in providing a structure for evaluating the project proponent's compliance with the statutory rules and in monitoring its progress at every step.

Step 1: Mining Lease

The grant of mining lease is governed by the Mines and Minerals (Development and Regulation) Act 1957 ('MMDR') and the Mines Act 1952, together with the rules and regulations framed under them. As a trustee, the state government has the power to award rights of exploring and exploiting mineral reserves to third parties, through processes for grant of Reconnaissance Permit, Prospecting license, and the mining lease.¹²¹ Hence, the primary objective of granting a mining lease is to confer rights over a specific mineral to private parties, subject to certain end-use conditions.

Step 1.1 Identifying the mineral

All minerals are vested in the state government as a trustee or custodian. The MMDR makes a classification between major minerals, where the central government has the authority to grant leases, and minor minerals, where the state government has such authority. However, even in the former, the state

¹²¹ The Mines and Minerals (Development and Regulation) Act 1957 ('MMDRA'), s. 3,4.

government must give its approval. The central government cannot proceed to issue the mining lease without the state government's approval. The central government makes rules for Part A, B, C and Schedule IV minerals.¹²² Part C deals with metallic and non-metallic minerals. Schedule IV deals with the notified minerals, which includes bauxite. Hence, central government has the power to make rules with respect to bauxite.¹²³

Step 1.2 Reconnaissance

The 2023 amendment act in MMDR, under Section 3(iii)(ha) defines this stage of obtaining mining lease as involving a preliminary survey to determine mineral resources. Reconnaissance operations are undertaken for preliminary prospecting and include: (i) aerial surveys, (ii) geophysical, and (iii) geochemical surveys. It also includes geological mapping.¹²⁴

The application shall be made to the respective state government in Form 'A' through the officer, as specified by the state government. This application shall be accompanied by a non-refundable fee, as given in the rules.¹²⁵

Step 1.3 Obtaining a Prospecting License

A prospecting license is issued by the respective state government before applying for the mining lease. This is done to obtain license for exploring the mine and for locating/proving mineral resources. The Mineral Concession Rules, 1960 outline the procedures and conditions for obtaining a Prospecting License or a Mining Lease.¹²⁶ Chapter 2 of the MMDR further lists out provisions for prospecting.¹²⁷

Within six months after completion of reconnaissance permit with an additional three months, the project proponent should apply for prospecting license, after submitting the reconnaissance report and the state government should provide an acknowledgement within three days after submitting.¹²⁸ If the conditions are fulfilled prospecting license is issued within 60 days unless there is an objection. If

¹²² *ibid*, s. 4(3), 5(1), 7(2), 8(2).

¹²³ *ibid*, Part C and Schedule IV.

¹²⁴ *ibid*, s. 3(aaa), 3(ae), 3(ha), 3(hb), 4.

¹²⁵ Mineral Concession Rules 1960 ('MCR'), Rule 4-7A.

¹²⁶ *ibid*, Chapter III.

¹²⁷ MMDRA (n 121) s. 4-9C.

¹²⁸ MCR (n 125) Rule 9 & 10.

the application lies with the central government, then the state government shall collect and forward the application to the central government and the central government has to communicate back within 120 days. After the central government gives the permission, the state government has sixty days to communicate.¹²⁹ On getting prospecting license, the project proponent has to get all relevant NOCs and submit a scheme with a 0.25% of the Bank Guarantee for resource value. For the central government the security deposit is 0.5% of the value of the mineral resources.¹³⁰

Prospecting license deed must be executed within ninety days. If the extension of prospecting period is needed, the same should be applied within ninety days.¹³¹

Prospecting License conditions, as provided in the Mineral Concession Rules, include – Material excavation limited to non-commercial purposes like testing, pilot plant testing etc as per schedule III. The project proponent can use extra quantities for the purpose of prospecting after paying the royalties to the state government. Also, the land should be restored after prospecting. The licensee can clear under growth brush wood for only line of sight or positioning of machinery. Furthermore, it should not lead to the deprivation of water essential for local requirements. It should also plug all boreholes within six months. And finally, under force majeure conditions such as civil commotion, strike, insurrection, earthquakes, lightning, pandemics, explosions, etc extension is permitted. If any minerals other than applied for is found, it should be informed to the state government within 60 days. In some cases, compensation for damage, indemnity to the government against claim of third party to be paid.¹³²

It should, however, be noted that Reconnaissance and Prospecting License are necessary only where the field is unexplored. However, if the field is already explored, then the proponent can directly apply for a mining lease.

Step 1.4 Application for mining lease

After prospecting is completed, the project proponent must submit an application for a mining lease within ninety days, subject to an extension for further ninety

¹²⁹ *ibid*, Rule 11 & 12.

¹³⁰ *ibid*, Rule 20.

¹³¹ *ibid*, Rule 15.

¹³² *ibid*, Rule 14.

days, following which the state government must grant or reject the application within thirty days.¹³³ The application must include the mining plan, a statement of estimated revenues, and a statement of royalty to be paid.

Step 1.5 Obtaining necessary clearances

Mining operations cannot be started before Environmental Clearances, Consent for Establishment and Consent for Operation. If it is a large area then there needs to be a public hearing.¹³⁴ Finally, after this the lease deed agreement is made.

Step 1.6 Grant of Mining Lease

The holder of a mining lease granted shall pay royalty to the state government under Section 9 of the MMDRA in respect of any mineral removed or consumed from the leased area at the rate specified under second schedule.¹³⁵

In 2015 District Mineral Foundation (DMF)¹³⁶ was introduced to benefit the persons and areas affected by the mining operations. Section 9B of the act established DMF as a trust, as a non-profit body by state government to work for the interest and benefit of persons, and areas affected. The mining lease holder shall, in addition to the royalty, pay to the DMF of the district in which the mining operations are carried on, an amount which is equivalent to such percentage of the royalty paid not exceeding one-third of such royalty, as may be prescribed by the central government. MMDR, 2021 amendment also gave central government power to issue directions regarding composition and utilization of funds by DMF. An order regarding inclusion of Hon'ble Members of Parliament in the Governing Council of DMF has been issued on 23 March 2021.

¹³³ *ibid*, Rule 22.

¹³⁴ *ibid*, Rule 22.

¹³⁵ *ibid*.

¹³⁶ MMDRA (n 121) s. 9B.



(Process flowchart under MMDR Act)

Step 2: Environmental, Forest, Pollution, and Wildlife Clearance

Step 2.1 Environmental Clearance

The environmental clearance process, as delineated in the Environmental Impact Assessment (EIA) Notification of 2006¹³⁷ enacted under the Environment Protection Act of 1986,¹³⁸ lays down the framework for regulating and mitigating the environmental impacts of various developmental projects in India.

The EIA 2006 Notification establishes project clearance categories,¹³⁹ shaping the Environmental Clearance process. The categories are outlined as follows:

¹³⁷ Environmental Impact Assessment Notification 2006 ('EIA 2006'), S.O. 1533(E) (India).

¹³⁸ Environment Protection Act 1986 ('EPA').

¹³⁹ EIA 2006 (n 137), Clause 4.

Category A	Category B
<p>Clearance Requirement: Environmental clearance needed from the Ministry of Environment and Forests.</p> <p>Scope: Applicable to new projects, expansions beyond specified limits, and deviations in product-mix in established production units.</p> <p>The proposed project falls within this category.</p>	<p>Clearance Requirement: Environmental clearance required from the State Environment Impact Assessment Authority (SEIAA).</p> <p>Scope: Pertains to existing projects exceeding specified limits as outlined in the Schedule of the notification.</p> <ul style="list-style-type: none"> • B1: Projects in critically polluted or ecologically sensitive areas. • B2: Projects located outside critically polluted or ecologically sensitive areas.

These categories influence the environmental clearance process and determine the level of scrutiny and the regulatory authority involved in granting clearance.

Within this framework, there are a range of successive processes that must be undertaken and complied with, each of which have been highlighted below. This report focuses on the steps applicable to Category A projects, as the current project falls under this category.

Step 2.1.1 Submission of Form 1 and Pre-feasibility Report

The environmental clearance (EC) process under the EIA Notification 2006 begins with the submission of "Form 1," detailed in Appendix II. This submission is accompanied by a pre-feasibility report, although the notification does not explicitly define its purpose. However, it can be inferred that the pre-feasibility report serves as a preliminary step before clearance, assessing basic project feasibility. Clause 6 of the EIA Notification outlines these requirements. Additional guidance on the contents of the pre-feasibility report is provided in the Ministry of Environment and Forests Guidelines dated 30 January 2010, which specify

mandatory components and emphasize the need for concise yet comprehensive information to facilitate scoping and TORs determination.¹⁴⁰

Step 2.1.2 Screening

Screening essentially refers to a process that is done to check whether a project requires environmental clearance as per the statutory notifications. Category A projects are not subject to this stage, and the EIA process for them starts from the stage of scoping, since all of these projects mandatorily require environmental clearance.

Step 2.1.3 Scoping

In the context of Category 'A' projects, 'scoping' is the process where the Environmental Appraisal Committee (EAC) determines comprehensive Terms of Reference (TOR) to address environmental concerns for the EIA report. The TOR is established based on the information provided in Form 1, including the applicant's proposed TOR, and may involve a site visit if deemed necessary by the respective committee. TORs shall be issued by the EAC within sixty days of the receiving of the application in Form 1, or else the TORs suggested by the applicant may be deemed as final.

Step 2.1.4 Public Consultation

It is the process of gathering input from locally affected individuals and others with a vested interest in the environmental impact of a project. The aim is to consider all pertinent concerns in the project's design. This consultation is mandatory for Category 'A' and Category 'B1' projects, excluding certain exceptions (mining is not one). A mandatory public hearing must be conducted on-site or in the immediate vicinity, facilitated by the State Pollution Control Board (SPCB).¹⁴¹ The SPCB welcomes written feedback from individuals with a vested interest in environmental impacts. This is facilitated by publishing a summary of the EIA report on the PCB's website, with the draft EIA report accessible upon request.

¹⁴⁰ Ministry of Environment and Forests, Guideline No. J-11013/41/2006-IA. II(I) dated 30 December 2010.

¹⁴¹ EIA 2006 (n 137) Appendix 4.

Step 2.1.5 Finalisation of EIA Report

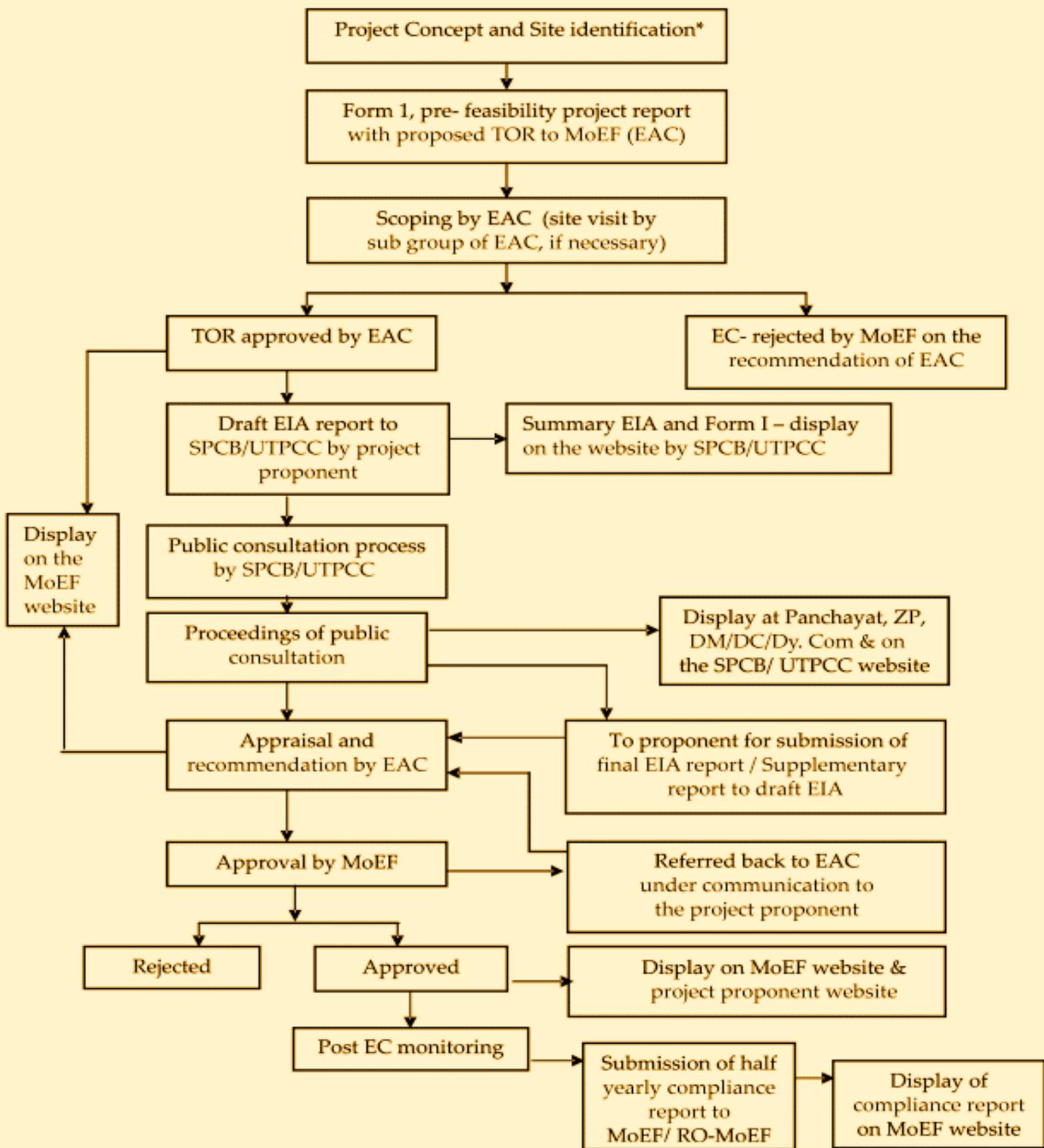
Following public consultation, the applicant must address expressed environmental concerns, incorporating necessary changes into the draft EIA and EMP. The final EIA report is then submitted for appraisal.

Step 2.1.6 Appraisal

Appraisal refers to the thorough examination by the EAC or SEAC of the application, along with documents such as the Final EIA report and outcomes of public consultations, including proceedings from public hearings. These are submitted by the applicant to the relevant regulatory authority i.e., the MoEFCC to obtain Environmental Clearance (EC).

Step 2.1.7 Grant or Rejection of EC

The final authority to decide the grant or rejection of the EC is the regulatory authority, in this category the MoEFCC. The authority must convey its decision within 45 days of receiving recommendations from the (EAC). If the authority disagrees with the EAC or SEAC recommendations, it can request reconsideration within 45 days. The EAC shall then consider the observations of the regulatory authority and furnish its views on the same within a further period of sixty days. The decision of the regulatory authority following this is final and conveyed to the applicant within the next thirty days. If the decision is not communicated within the specified timeframe, the applicant can proceed as if clearance has been granted or denied based on the committee's recommendations. Deliberate submission of false information may lead to rejection or cancellation of prior clearance, decided after giving the applicant a personal hearing and following principles of natural justice.



(Process Flowchart for Environmental Clearance)

Source: MoEF&CC, Environmental Impact Assessment Guidance Manual for Mining Minerals, 2010)

Concerns with EIA Notification 2006 – The framework as it exists at the moment

One of the primary concerns with the process of EC is the possibility of violation of the precautionary principle by means of “*Ex-Post Facto EC*”. In fact, this possibility is more likely a reality today, evident from a pursual of certain notifications, where the authorities have provided for a window for certain industries to apply for EC in case, they were operating without it as long as they had valid consent to operate. It must be noted, however, these notifications came in as a response to certain judicial pronouncements,¹⁴²

The Supreme Court in the case of *D Swamy v. Karnataka State Pollution Control Board*,¹⁴³ examined the legality of certain notifications that allowed for post facto EC in certain industries. The Supreme Court upheld the National Green Tribunal's decision, emphasizing that a Common Biomedical Waste Treatment Facility (CBWTF) operating with valid consent from the Pollution Control Board should not be shut down solely due to the absence of prior environmental clearance. The court acknowledged that while granting *ex-post facto* environmental clearances should not be a common practice, they should not be rejected rigidly and should be considered under certain conditions.

The specified conditions for granting *ex-post facto* environmental clearances include:

- exceptional circumstances with thorough consideration of all relevant environmental factors;
- when the negative consequences of denial outweigh those of approval;
- adherence to all required pollution norms by the concerned establishment; and
- compliance with applicable statutory rules in granting such approvals.

The Supreme Court stated that *ex-post facto* environmental clearances were not prohibited under the Environment Protection Act 1986. Thus, the grant of an environmental clearance was permissible if the projects complied with the appropriate statutory requirements or could be made to comply with the necessary environmental norms.

So, it is clear, that the possibility of *ex-post facto* EC has received judicial approval, with

¹⁴² Case in point is Notification numbered 3025 was promulgated due to an NGT order allowing for post facto ECs in the steel rolling industry.

¹⁴³ 2022 SCC OnLine SC 1278.

the Supreme Court laying down principles for determining cases where it can be used. This is a stark departure from the earlier position of law which held *ex-post facto* ECs as being inconsistent with the EIA framework.¹⁴⁴

In fact, the possibility of *ex-post facto* EC has already been implemented by the Government. The Draft EIA Notification of 2020 aimed to revamp India's environmental assessment framework by simplifying procedures and incorporating amendments to the existing 2006 notification.¹⁴⁵ However, it drew widespread criticism for potentially weakening fundamental EIA principles, such as the precautionary principle, by introducing provisions for retroactive clearance and diluting public consultation standards through exemptions for certain project categories.¹⁴⁶ Despite not being implemented, elements of the draft have been integrated into the current EIA framework, sparking ongoing debate over its implications for environmental governance and public involvement.¹⁴⁷

¹⁴⁴ Kerala State Coastal Zone Management Authority v. State of Kerala Maradu Municipality, (2019) 7 SCC 248.

¹⁴⁵ Draft EIA Notification (n 2).

¹⁴⁶ M.Z.M. Nomani, Ghazal Salahuddin, & Mohammad Rauf, 'Assessing Indian EIA Law in the context of EIA Draft Notification 2020' 27 Eco. Env. & Cons. (November Suppl. Issue) S81-S85 (2021).

¹⁴⁷ Jayashree Nandi (n 25).

Step 2.2 Forest Clearance

The Forest Clearance process in India is regulated by the Forest (Conservation) Act, 1980 (FCA). The Act aims to ensure that forest lands are not indiscriminately diverted for non-forestry purposes by requiring prior approval from the central government.¹⁴⁸ The Act, however, mainly serves as a framework legislation. It is the guidelines and rules framed under the aegis of the Act that provide the procedure to be followed to gain the forest clearance. When the current proposal was submitted, Forest Conservation Rules ('FRC') 2022 was applicable. However, FRC 2023 was enacted in December 2023 after the proposal was submitted pending the various clearance processes. This report focuses on the framework provided in the FRC 2023, which is highlighted below.

Prior Approval by State Government

(i) Submission of Application

The process of forest clearance starts with the submission of an application by the project proponent to the state government or Union Territory Administration for (1) the de-reservation of forest land [or]; (2) the use of forest land for non-forest purposes [or]; (3) for assignment of lease.¹⁴⁹ The application is submitted to the Nodal Officer of the state government along with requisite information and completed documents.¹⁵⁰

(ii) Project Screening Committee

After that, the state government or UT Administration may set up a Project Screening Committee to examine (1) whether the proposal is complete [and]; (2) whether the proposed activity is not in a restricted area or category for screening. According to the Rules, the constitution of the Project Screening Committee is not compulsory. The Project Screening Committee makes its recommendation to the state government or UT Administration.¹⁵¹

¹⁴⁸ 'Introduction', The Official Website of Ministry of Environment, Forest and Climate Change, Government of India, *available at* <<https://moef.gov.in/en/division/forest-divisions-2/forest-conservation-fc/introduction/>> accessed 27 February 2024.

¹⁴⁹ Forest (Conservation) Rules 2022 ('FCR'); Van (Sanrakshan Evam Samvardhan) Rules 2023 ('Rules 2023').

¹⁵⁰ National Information Centre, 'Parivesh CPC Green – FC Technical FAQ', 14 March 2023, *available at* <https://parivesh.nic.in/writereaddata/ENV/Forest_Clearance_Technical_FAQ.pdf>, paragraph 2.

¹⁵¹ FCR (n 149) Rule 9(4)(a); Rules 2023, Rule 9(5),9(7).

(iii) Field verification and inspection

After ensuring that the proposal is complete, it is sent to the concerned Divisional Forest Officer, District Collectors and Conservator of Forests or Chief Conservator of Forests for field verification and field inspection to be undertaken.¹⁵²

(iv) Nodal Officer

The Division Forest Officer shall forward the proposal, after checking its completeness, to the Nodal Officer. The Nodal Officer means any officer not below the rank of Additional Principal Chief Conservator of Forests, authorized by the State Government or the Union territory Administration.¹⁵³ The Nodal Officer shall seek the approval of the Principal Chief Conservator of Forests for the proposal first. After that, the Nodal Officer shall forward the proposal to the State Government or UT Administration along with his recommendations.¹⁵⁴

(v) Rejection/Approval by State Government or Union Territory

If the state/ UT government decides not to de-reserve the forest land, divert forest land for non-forest purposes, or assign a lease of forest land, it is, then, intimated to the project proponent by the Nodal Officer.¹⁵⁵ If the state/UT government agrees 'In-Principle' to de-reserve the forest land, divert forest land for non-forest purposes or assign a lease of forest land, they forward the proposal to the central government along with its recommendations.¹⁵⁶

In-Principle approval by Central Government

Mining proposals fall under Rule 9(5)(b) of the Forest (Conservation) Rules 2022 or Rule 10(2) of the *Van (Sanrakshan Evam Samvardhan)* Rules 2023. Under this Rule, the process specified for 'mining' rules differs from other proposals.

(i) Site inspection report

¹⁵² FCR (n 149) Rule 9(4)(e),9(4)(g); Rules 2023, Rule 9(10)(12).

¹⁵³ FCR (n 149) Rule 2(r); Rules 2023, Rule 2(r).

¹⁵⁴ FCR (n 149) Rule 9(4)(k); Rules 2023, Rule 9(16).

¹⁵⁵ FCR (n 149) Rule 9(4)(l); Rules 2023, Rule 9(17).

¹⁵⁶ *ibid*, Rule 9(4)(m); Rules 2023, Rule 9(18).

A site inspection report is to be prepared for the proposal by the Regional Office.¹⁵⁷ It needs to be submitted to the central government so that it can be evaluated by the Forest Advisory Committee.¹⁵⁸

(ii) Forest Advisory Committee

The Forest Advisory Committee may be set up by the central government.¹⁵⁹ The Committee shall examine all proposals.¹⁶⁰ According to the Rules, the constitution of the Forest Advisory Committee is not compulsory. It shall give due regard to multiple factors, including whether the state government or the Union Territory Administration has considered whether they have considered all alternatives and whether this is the only alternative that fits the requirements,¹⁶¹ whether the state government or the Union Territory administration has deliberated on the impact of the project on environment and forests,¹⁶² the concerned mandates under National Forest Policy,¹⁶³ whether adequate mitigation measures have been taken towards the residing fauna (especially endangered animals) in that area,¹⁶⁴ etc. After enquiry, it shall make its recommendation to the central government for consideration.¹⁶⁵ While making recommendations, the Forest Advisory Committee may also impose any conditions, restrictions or mitigation measures it deems fit on actions which may offset adverse environmental impact.¹⁶⁶

(iii) Rejection/Approval of In-Principle Approval by Central Government

After the recommendation made by the Forest Advisory Committee, the central government shall either reject or approve the proposal. Then, it shall communicate the rejection or approval of the proposal to the state government or Union Territory and the project proponent.¹⁶⁷

¹⁵⁷ *ibid*, Rule 9(5)(d); Rules 2023, Rule 10(4).

¹⁵⁸ *ibid*, Rule 9(5)(e)(i); Rules 2023, Rule 10(5)(i).

¹⁵⁹ *ibid*, Rule 3; Rules 2023, Rule 3.

¹⁶⁰ *ibid*, Rule 5; Rules 2023, Rule 5.

¹⁶¹ *ibid*, Rule 9(5)(e)(ii)(B); Rules 2023, Rule 10(5)(ii)(b).

¹⁶² *ibid*, Rule 9(5)(e)(ii)(C); Rules 2023, Rule 10(5)(ii)(c).

¹⁶³ *ibid*, Rule 9(5)(e)(ii)(D); Rules 2023, Rule 10(5)(ii)(d).

¹⁶⁴ *ibid*, Rule 9(5)(e)(ii)(E); Rules 2023, Rule 10(5)(ii)(e).

¹⁶⁵ FCR (n 159) Rule 9(5)(e)(ii); Rules 2023, Rule 10(5)(ii).

¹⁶⁶ *ibid*, Rule 9(5)(e)(iv); Rules 2023, Rule 10(6).

¹⁶⁷ *ibid*, Rule 9(5)(e)(iv); Rules 2023, Rule 10(7).

Final Approval by the Central Government

(i) Communication of In-Principle Approval

After receiving 'In-Principle' approval from the central government, the Nodal Officer shall communicate the approval to (1) Divisional Forest Officers; [and] (2) District Collectors; [and] (3) Conservator of Forests.¹⁶⁸

(ii) Preparation of Documents by Divisional Forest Officer

After receiving the communication, the Divisional Forest Officer shall prepare (1) an Item-wise Demand Note of Compensatory Levies to be paid; and (2) List of documents, certificates and undertakings required - to be submitted by the project proponent in compliance with the conditions stipulated in the 'In-Principle' approval.¹⁶⁹

(iii) Submission of documents by Project Proponent

The project proponent shall then submit (1) Payment of Compensatory Levies, (2) Compliance Report, (3) Land identified for Compensatory Afforestation and (4) Evidentiary Document for payment of Compensatory Levies; to the Divisional Forest Officer.¹⁷⁰

(iv) Assessing documents for completeness

After receiving the compliance report, the Divisional Forest Officer shall examine its completeness and make his recommendations to the Conservator of Forests. However, this requirement is now removed under the 2023 Rules.¹⁷¹ The Conservator of Forests, after having received the compliance report shall make his recommendations on the compliance report and forward the same to the Nodal Officer.¹⁷²

(v) Nodal Officer seeks approval and forwards to State Government

¹⁶⁸ *ibid*, Rule 9(6)(a)(i); Rules 2023, Rule 11(1).

¹⁶⁹ *ibid*, Rule 9(6)(a)(ii); Rules 2023, Rule 11(2).

¹⁷⁰ *ibid*, Rule 9(6)(a)(iii); Rules 2023, Rule 11(3).

¹⁷¹ FCR (n 149) Rule 9(6)(a)(iv); In the Van Rules 2023, this section was removed. The Divisional Forest Officer does not require the approval of the Conservator of Forests.

¹⁷² *ibid*, Rule 9(6)(a)(v); Rules 2023, Rule 11(4).

The Nodal Officer seeks approval from the Principal Conservator of Forests of the State Government or head of the Department in case of Union territory Administration. After ensuring the completeness of the proposal, the Nodal Officer shall forward the report to the state/ UT government with its recommendation.¹⁷³

(vi) Forwarding compliance report to Central Government

The state government forwards the compliance to the Regional Office. The central government after receiving the compliance report and ensuring its completeness may give 'Final' approval and communicate such a decision to the state government or Union territory Administration and the project proponent.¹⁷⁴

(vii) Ensuring compliance with all laws, especially Forest Rights Act

After receiving the Final Approval of the central government, the state government or the Union Territory administration must ensure that provisions of all Acts have been fulfilled and complied with, including ensuring settlement of rights and FPIC under FRA. Only then can the state government order for diversion, assignment of lease or de-reservation, as the case may be.¹⁷⁵ The final order is published in the Gazette Notification of the state government or the Union Territory administration.¹⁷⁶ After this, the forest land may be handed over or assigned, as the case may be.¹⁷⁷

Compliance under FRA

The MoEFCC has notified that the compliance requirement under the FRA must be fulfilled before the final approval by the central government, but may not necessarily be fulfilled to get the "In-Principle Approval".¹⁷⁸ However, after the 2023 Rules has come into force, the central government has no further role to play in ensuring compliance with the FRA before either In-Principle or Final Approval.

¹⁷³ *ibid*, Rule 9(6)(a)(vi); Rules 2023, Rule 11(5).

¹⁷⁴ *ibid*, Rule 9(6)(b)(i); Rules 2023, Rule 11(6).

¹⁷⁵ *ibid*, Rule 9(6)(b)(ii); Rules 2023, Rule 11(7).

¹⁷⁶ *ibid*, Rule 9(6)(c)(i); Rules 2023, Rule 11(9).

¹⁷⁷ *ibid*, Rule 9(6)(e); Rules 2023, Rule 11(11).

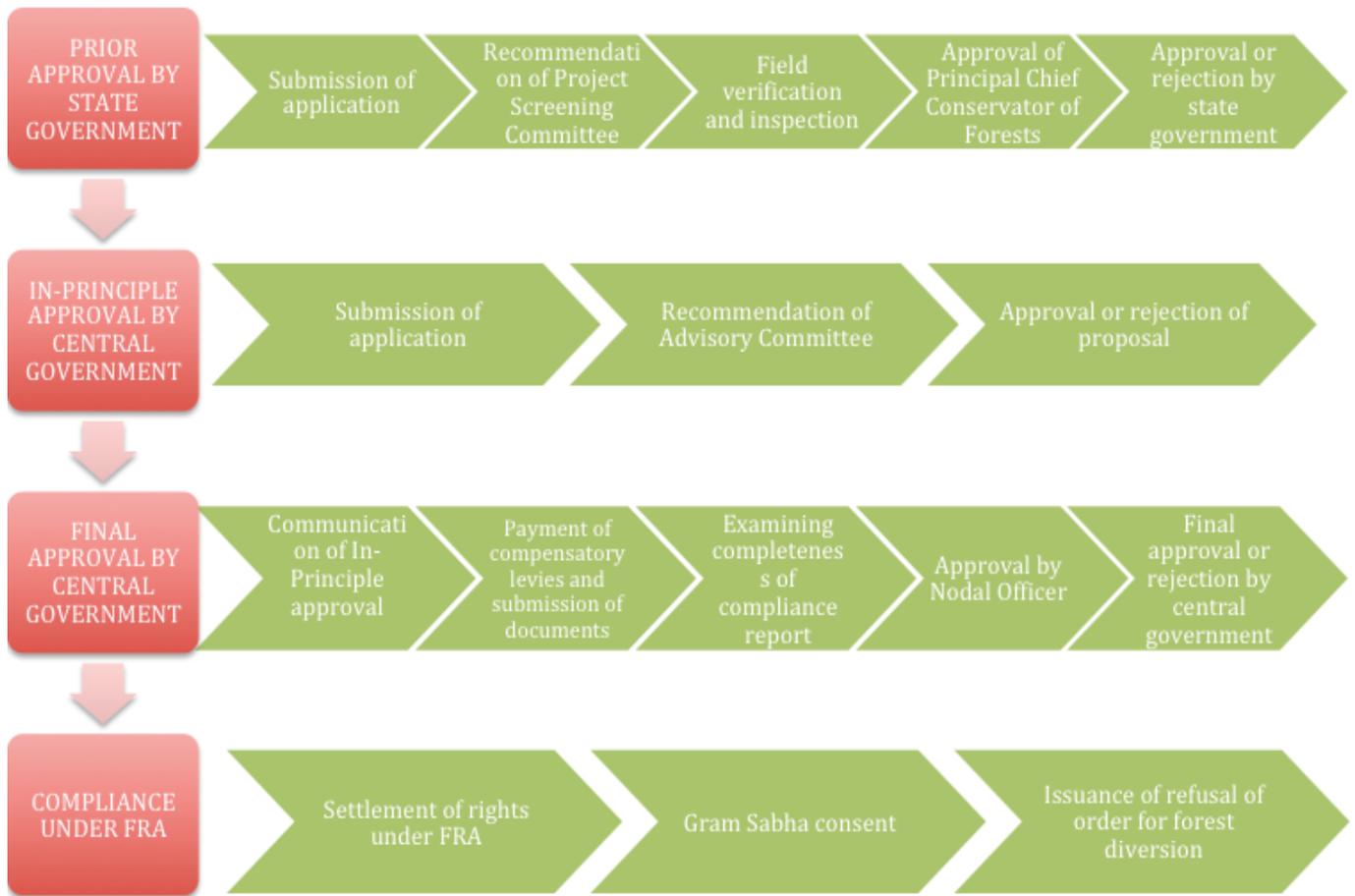
¹⁷⁸ Compliance of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, 26 February 2019, available at <[https://forestsclearance.nic.in/writereaddata/public_display/schemes/1191986937\\$26_2_19_FRA%20reg.pdf](https://forestsclearance.nic.in/writereaddata/public_display/schemes/1191986937$26_2_19_FRA%20reg.pdf)>.

After the enactment of the 2023 Niyam, the state government is responsible for ensuring such compliance.

To formulate unconditional proposals under the FCA, wherever the settlement of rights under the FRA has been completed or is under process, there is a requirement to enclose evidence for initiating and completing it.¹⁷⁹ The enclosure of evidence will have the following:

- a. Letter from the state government certifying the complete process for identification and settlement
- b. Letter from state government, certifying that proposals for such diversion have been placed before the concerned *gram sabha* under FRA
- c. Letter from concerned *gram sabhas* indicating the process, and that they have given their consent to the proposed diversion and the compensatory and ameliorative measures
- d. Letter from the state govt certifying that the diversion for facilities managed by the government as required under Section 3(2) FRA have been completed and the *gram sabhas* consented to it
- e. Letter from state government certifying that discussions and decisions on such proposals had taken place when there was a quorum of 50% of members of the *gram sabhas* present. Rule 4(2) of the FR Rules also requires that of those present, at least one-third are women.
- f. Obtaining the written consent or rejection of the *gram sabha* to the proposal
- g. A letter from the state government certifying that the rights of Particularly Vulnerable Tribal Groups (PVTGs), where applicable have been specifically safeguarded as per 3(1)(e) of the FRA.
- h. Any other aspect having a bearing on the operationalisation of the FRA.

¹⁷⁹ Diversion of forest land for non-forest purposes under the Forest (Conservation) Act, 1980 - ensuring compliance of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, 03 August 2009, available at <[https://forestsclearance.nic.in/writereaddata/public_display/schemes/981969732\\$3rdAugust2009.pdf](https://forestsclearance.nic.in/writereaddata/public_display/schemes/981969732$3rdAugust2009.pdf)>.



(Process Flowchart for Forest Clearance under FRA)

Step 2.3 Pollution Clearances

Under the provisions of the Water (Prevention & Control of Pollution) Act, 1974 and the Air (Prevention & Control of Pollution) Act, 1981, any industry, operation, or process or an extension and addition thereto, which is likely to discharge sewerage or trade effluent into the environment or likely to emit any air pollution into the atmosphere will have to obtain the Consent, which broadly falls under following two categories.

- a. Consent to Establish: It is required to be obtained before establishing any Industry, Plant, or Process. The Consent to Establish is the primary clearance.
- b. Consent to Operate: Once the Industry, Plant, or Process being established according to mandatory pollution control systems, the units are required to obtain consent to operate which is a secondary consent.

This CTO must be mandatorily acquired after all the conditions imposed in environment clearance/forest clearance/ are complied with, whereas CTE can be applied parallelly with the EC/FC process.¹⁸⁰ The State Pollution Control Board ('SPCB') grants consent to establish once, for a period of three to five years. According to the industry's red, orange, and green categories, the CTO is valid for five, ten, and fifteen years, respectively, with the option to renew the CTO.¹⁸¹

Sub-categorisation based on nature of industry

The MoEFCC has developed¹⁸² the Pollution Index (0-100), which is a function of emissions (air pollutants), effluents (water pollutants), hazardous waste production, and resource consumption, and hence, is used to classify industrial sectors.

The industries are divided into four parts,¹⁸³ depending on the Relevant Pollution Index.¹⁸⁴ The categorization's main goal is to guarantee that the industry is developed in a way that is compatible with initiatives taken to protect and enhance the environment.

- (i) Pollution Index score of 60 and above - Red category- The pollution index for industries in the red category is 60. These entities can disrupt the ecological equilibrium due to their high levels of pollutants.
- (ii) Pollution Index score of 41 to 59 – Orange category- Industries classified as Orange fall into this category if they release hazardous waste into the air or water or contribute significantly to pollution in those areas.
- (iii) Pollution Index score of 21 to 40 – Green category- They are not required to seek for permission to establish or permission to operate within the SPCB.

¹⁸⁰ Ministry of Environment, Forest & Climate Change, Government of India vide letter no. J-11015/77/ 2006-IA. II (M), 24 July 2000.

¹⁸¹ 'Procedure for Obtaining Consent to Establish & Consent to Operate an Industry', Lawrbit, *available at* <<https://www.lawrbit.com/wp-content/uploads/2021/01/article-cte-cto.pdf>>.

¹⁸² 'Categorisation of Industries', Vikaspedia, *available at* <<https://vikaspedia.in/energy/policy-support/environment-1/environment-ministry-releases-new-categorisation-of-industries>>.

¹⁸³ Central Pollution Control Board, Modified Directions under Section 18(1)(b) of the Water (Prevention & Control of Pollution) Act, 1974 and The Air (Prevention & Control of Pollution) Act, 1981 Regarding Harmonization of Classification of Industrial Sectors under Red/Orange/Green/White Categories – No. B-29012/ESS(CPA)/ 2015-16/, 07 March 2016.

¹⁸⁴ Ministry of Environment, Forest and Climate Change, 'Environment Ministry releases new categorization of industries', Press Information Bureau, *available at* <<https://pib.gov.in/newsite/printrelease.aspx?relid=137373>>.

- (iv) Pollution Index score including and up to 20 - White category- Acquiring consent to operate is not required and an intimation to concerned SPCB/PCC shall suffice.¹⁸⁵

Process for obtaining consents

The process for obtaining permission to establish and operate from the State Pollution Control Board (SPCB) involves submitting an online application through their portal, along with necessary documentation and scrutiny fees. Following this, the site undergoes a physical inspection, to satisfy the State Pollution Control Board's mandated requirements and the consent application (CTO and CTE) are verified by the designated officer. The application is then reviewed by the designated officer to ensure it is complete. If so, an acknowledgement is issued. If incomplete, the officer provides feedback for rectification.¹⁸⁶

However, the Water (Prevention and Control of Pollution) Amendment Bill, 2024 has attempted to weaken the requirement of consent under the original Act. The Bill specifies that the central government, in consultation with the Central Pollution Control Board, may exempt certain categories of industrial plants from obtaining consent from SPCBs to establish industries. This was mandatory in the earlier act. The amendment has also decriminalised offences by removing imprisonment provision for most violations and by replacing it with a fine in the range of Rs 10,000 to Rs 15 lakh.¹⁸⁷

Step 2.4 Wildlife Clearance

Wildlife clearance plays a crucial role in protecting India's designated protected areas. The Wildlife (Protection) Act 1979 (WLPA) created the National Board for Wild Life (NBWL) and entrusted it with certain powers. One of the powers is for creation of a Standing Committee (SCNBWL) and delegating certain responsibilities to the body. Currently, the power to consider proposals for

¹⁸⁵ State Pollution Control Board, Odisha, Categorization of Industries & Consent Management: Letter No. 2938, 01 July 2016.

¹⁸⁶ State Pollution Control Board, Odisha, Office Order No. 632/Ind-II-NOC-Misc/204 for Streamlining the Procedure for Processing Consent Application, 07 January 2016.

¹⁸⁷ Jayanta Basu, 'Centralisation of powers, diluted laws: Weak Water Act further diluted by latest amendments, say experts', Down To Earth, 16 February 2024, available at <<https://www.downtoearth.org.in/news/environment/centralisation-of-powers-diluted-laws-weak-water-act-further-diluted-by-latest-amendments-say-experts-94487>>.

developmental activities within the Protected Areas rests with the SCNBWL. The Guidelines dated 13 December 2023 are the latest and the most comprehensive articulation of the wildlife clearance process.¹⁸⁸

Protected Areas where a wildlife clearance is required include wildlife sanctuaries, National Parks, Tiger Reserves and Linking Areas, Eco-Sensitive Zones, and other areas: where the chairpersons of NBWL/SCNBWL or the Supreme Court or any other statutory agency is of the opinion that a referral is required. Therefore, any activities requiring diversion within these areas require a clearance by submitting a proposal through the online portal, *Parivesh*.

Once the proposal is submitted, an initial scrutiny is conducted by the Wildlife Warden within five days. Thereafter, a site-inspection is conducted and the Conservator of Forests, the Chief Conservator of Forests, or the Additional Principal Chief Conservator of Forests will be consulted. Fifteen days are earmarked for this process, after which the proposal is examined by the Chief Wild Life Warden and a recommendation is made to the state government. Along with the proposal, the Chief Wild Life Warden is also required to suggest the estimated costs of implementing the proposed mitigation measures.¹⁸⁹ Within 45 days, the state government is supposed to consult the State Board for Wild Life (SBWL) and accordingly, a recommendation is made to the MoEFCC. The Ministry scrutinizes the proposal initially for ten days upon which recommendation of the SCNBWL is sought. As the meetings of the SCNBWL occur within three months, the timeline for SCNBWL recommendation remains the same.

One of the other areas which is considered as a Protected Area is the ten km zone from the perimeter of National Parks or Wildlife Sanctuaries. As per the Supreme Court Judgement in the case of *Goa Foundation v. Union of India*,¹⁹⁰ projects within this ten km zone are supposed to be considered by the SCNBWL even if such

¹⁸⁸ Guidelines dated 13 December 2023 'Revised guidelines for seeking recommendations of the Standing Committee of National Board for Wild Life for activities in protected areas' available at <https://parivesh.nic.in/writereaddata/Final_Guidelines_NBWL_recommen_for_PA.pdf>.

¹⁸⁹ Guidelines dated 25 November 2021 'Cost of mitigation measures due to impact of developmental activities in National Parks, Sanctuaries, their Eco-Sensitive Zones, Tiger Reserves and Tiger Corridor' available as Annexure VII to Guidelines dated 13 December 2023.

¹⁹⁰ Order dated 04 December 2006 in WP 460/2004.

zones are not notified as Eco-Sensitive Zone (ESZs).¹⁹¹ However, this buffer zone has been reduced to one km by the Supreme Court, as recently as 2023.¹⁹² Mining finds a special mention in the comprehensive Guidelines. Given the Supreme Court's judgement,¹⁹³ the Guidelines laid down therein prohibit mining activities within National Parks, Wildlife Sanctuaries, and their correspondingly notified ESZs or one km from the boundary of the National Parks and Wildlife Sanctuaries, whichever is more. The Guidelines refer to another set of instructions which divide projects into three types: those which are to be permitted, those to be regulated, and those to be prohibited.¹⁹⁴ Therefore, mining activities within and close to Protected Areas is either regulated or prohibited. The Guidelines mention that such projects for diversion within ESZs are not to be forwarded.

Step 3: Land Acquisition

The land acquisition stage comes into picture when the project proponent has obtained all the environment and other clearances. The provisions outlined in the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation, and Resettlement Act 2013 ('LARR') establishes a framework that attempts to strike a balance between the government's authority to acquire land for public purposes and the protection of the rights of affected individuals and communities.

With respect to the land acquisition under the state government's authority, the process unfolds through a series of steps dictated by various sections. Until 2013, land acquisition for development projects in India was carried out under the Land Acquisition Act, 1894. This law's lack of safeguards and loose definition of the 'public purpose' for which land could be acquired led to large-scale forced evictions, uprooting millions of families from their homes without adequate compensation, rehabilitation, or remedy.¹⁹⁵ In 2013, LARR was introduced which

¹⁹¹ Guidelines dated 8 August 2019 'Procedure for consideration of developmental projects located within 10 km of National Park/Wildlife Sanctuary seeking environmental clearance under the provisions of the Environmental Impact Assessment (EIA) Notification, 2006' *available at* <https://parivesh.nic.in/writereaddata/Applicability_of_SCNBWL_Clearance.pdf>.

¹⁹² Order dated 26 April 2023 and 28 April 2023 in *TN Godavarman* (n 83).

¹⁹³ *ibid*.

¹⁹⁴ Guidelines dated 9 February 2011 'Guidelines for Declaration of Eco-Sensitive Zones around National Parks and Wildlife Sanctuaries' *available at* <https://parivesh.nic.in/writereaddata/Guidelines_for_EcoSensitive_Zones_around_Protected_Areas.pdf> 8.

¹⁹⁵ Amnesty International India, 'India: When land is lost, do we eat Coal? Coal mining and violations of

ensured equal treatment for land rights held by *adivasis* and forest dwellers alongside private landowners in land acquisition processes.

Pertinent to note that land is a state subject and thus, the state legislature has powers to enact its own laws. Odisha enacted its own Odisha Right to Fair Compensation and Transparency in Land Acquisition, Resettlement and Rehabilitation Rules under Section 109 of LARR in 2016. Separately, it is also possible to enact subject-specific land acquisition laws, for instance, for railways or coal-bearing areas. Several states have sought to bypass rights protections in the central LARR Act through their own state enactments. Further, governments are increasingly turning to schemes of ‘private purchase’ from landowners in their individual capacities through market dynamics, instead of through the statutory process. This section recounts the relevant procedure for land acquisition under LARR.

Step 3.1 Submission of the Application

Project proponent initially applies under ‘Form A’ to the collector of the concerned area with the Land Schedule, mentioning the detailed description of the Land. The collector scrutinizes the application.

Step 3.2 Inspection by the SIA Team

The application is then forwarded by the collector to the state SIA Team. For this, the state government needs to release notification for commencement of consultation & Social Impact Assessment (‘SIA’) study as per Section 4(1) of the Act, comprehensively evaluating the social and economic implications of the proposed project.

The SIA aims to determine if the acquisition serves public purpose, estimate affected families and potential displacement, identify affected land, houses, and public/private properties, assess if the land acquisition is minimal for the project, explore alternative acquisition sites if feasible, and lastly, study social impacts, associated costs, and their influence on project benefits versus costs.

Step 3.3 Public Hearing

As per Section 5 of the Act, during the SIA study, the state government needs to ensure that a public hearing is held at the affected area, after giving adequate publicity about the date, time, and venue for the public hearing. This is done to ascertain the views of the affected households, which, then, also needs to be mentioned in the Social Impact Assessment Report. Apart from this, as per Section 4(6), the SIA authority conducting SIA study need to prepare a Social Impact Management Plan, listing the ameliorative/mitigating measures required to be undertaken for addressing the probable impact. This whole process of SIA needs to be completed within 6 months from its commencement.

Step 3.4 Inspection by the Expert Committee

As per Section 7 of the Act, the State government needs to ensure that the SIA Report is evaluated by an independent multi-disciplinary Expert Group constituted by it. This expert group must consist of two non-official social scientists, two representatives of Panchayat or Gram Sabha, two experts on rehabilitation, and technical expert in the subject relating to the project. The expert committee makes the further decisions regarding approval or disapproval of the project based on associated social costs and potential benefits.

Step 3.5 Examination and Recommendation by the State Government

Section 8 necessitates the state government to examine the proposals for Land Acquisition and also to independently examine the SIA report. The state government after considering all the reports, recommend such area for acquisition which would ensure minimum displacement of people, minimum disturbance to the infrastructure, ecology and minimum adverse impact on the individuals affected.

Step 3.6. Obtaining prior consent

Moreover, as per Section 2(2) of LARR i.e. prior consent of the affected household, Section 8 itself puts a check on this by mandating the government to ascertain whether the prior consent of the affected household has been obtained in

the manner as may be prescribed at that time. Under this, the definition of consent means “Free Prior Informed Consent”.¹⁹⁶

Step 3.7 Preliminary Notification

As per Section 11, state government shall release a “preliminary notification” to that effect along with details of the land to be acquired. The same shall be published in two daily newspapers circulating in the affected areas of which one shall be in the regional language.

Step 3.8 Rehabilitation and Resettlement (‘R&R’)

After the release of the preliminary Notification, the preparation of ‘Rehabilitation and Resettlement Scheme’ (RRS) (i.e. an alternative settlement plan for the displaced people,) is initiated by the ‘Administrator for Rehabilitation and Resettlement’ (ARR) as per Section 16 of the Act. The ARR conducts a survey and undertakes a census of the affected families and prepares a Draft RRS which includes a list of Government buildings to be provided in the Resettlement Area and the details of the public amenities and infrastructural facilities which are to be provided in the Resettlement Area.

Step 3.9. Public Hearing – Consultation to R&R in Scheduled Areas

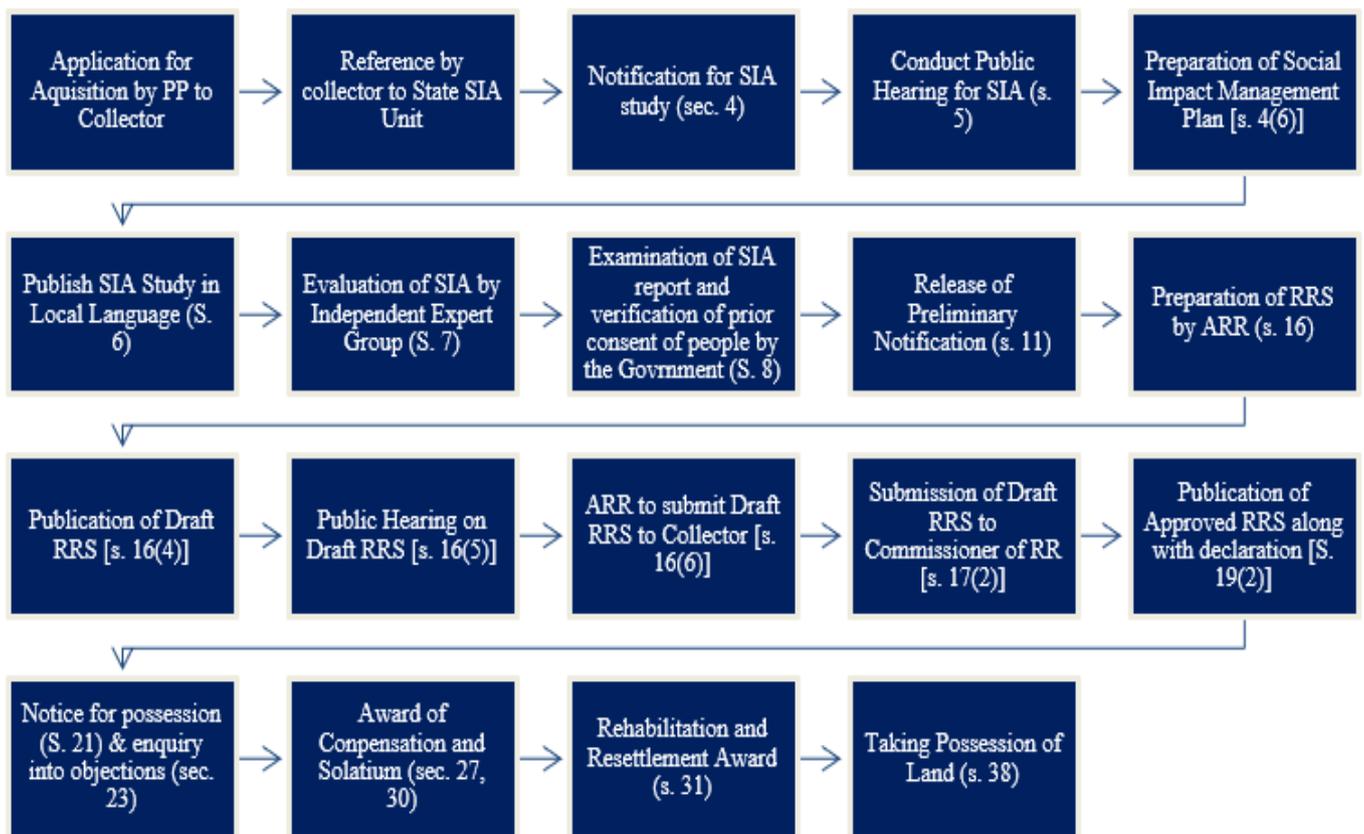
Again, a public hearing is conducted in the same manner as stated before and that the consultation with the Gram Sabha in Scheduled Areas is in accordance with the provisions of PESA Act 1996.

After the consultations, the Draft RRS is submitted to the collector, also mentioning the specific claims and objections raised during the public hearing [Section 16(6)]. After which, as per Section 17(2), the Collector reviews the RRS and submits the same to the Commissioner of Rehabilitation and Resettlement for approval of the Scheme, along with his suggestions. Lastly, the Commissioner makes the approved RRS available in the local language and publishes it in affected areas.

Step 3.10 Objections and Final Possession

¹⁹⁶ ‘Free, Prior, Informed Consent (FPIC) A brief manual’, Natural Resource Knowledge Activist Hub –A Knowledge Initiative of ActionAid Association, 2018, p. 8, *available at* <<https://www.actionaidindia.org/wp-content/uploads/2018/12/Free-Prior-Informed-Consent-English.pdf>>.

After the Land is demarcated for Acquisition, as per Section 21, the Collector issues a ‘Public Notice’ stating that the Government intends to take possession of the land, and that claims to compensations and rehabilitation and resettlement for all interests in such land can be made to him. As per Section 23, the collector can enquire in to the objections raised by the interested people in the Land, w.r.t the notice issued, the measurements taken, or the valuation given. At the end, as per Section 38, the Collector can take possession of land after ensuring that full payment of compensation as well as rehabilitation and resettlement entitlements are paid or tendered to the entitled persons.



(Process Flowchart for Land Acquisition and Resettlement under LARR Act)

Special protection for SC/ST

Section 41 clearly states that “as far as possible, no acquisition of land shall be made in the Scheduled Areas”, injecting a crucial layer of protection. However, under sub-section 2, it states that if the Land Acquisition is being done in such

areas, it has to be done as a demonstrable last resort and in such cases, the prior consent of the concerned Gram Sabha, in Scheduled Areas under the Fifth Schedule to the Constitution or of the Autonomous District Councils where applicable, has to be obtained.

Pertinent to note that the LARR Act provides not one but three avenues for public hearing and consent proceedings, at each successive stage of the project.

The chapter detailed three major steps in the legal process for setting up of a mining project, covering central and state laws both. These steps are: obtaining mining lease, clearances (environmental, forest, pollution, wildlife), and land acquisition. As the chapter demonstrates, most of these processes are shaped by executive instruments and not by the statutes themselves, reflecting a high degree of delegation of quasi-legislative powers to the executive. The description also notes relevant authorities, their powers, and functions at each stage, that opens up avenues for participation and intervention of rightsholders and affected communities. Tragically, this extended process delays avenues for participation and representation by affected communities until a very late stage in the process. It is possible for the state government to undertake reconnaissance and scoping of minerals, award the mining lease, and for the project proponent to initiate the clearance processes, obtain reviews by the EAC and FAC, submit a draft EIA report, before which affected communities enter the picture at the stage of public hearings under the EIA Notification 2006. This puts into question whether the present legal framework respects the requirement of ‘prior’ consent under FPIC. This is quite apart from recent amendments to the forest clearance process, where the requirement of FRA compliance through rights settlement and consent proceedings have been removed from Stage-I/ ‘in-principle’ clearance, to be conducted at any time before final issue of certificate.

The background of the slide is a landscape photograph. It shows a sunset or sunrise with a bright sun low on the horizon, partially obscured by the silhouette of a tree on the right. The sky is a mix of orange, yellow, and light blue. In the foreground, there is a field of green grass and some trees. A semi-transparent dark red rectangle is overlaid on the center of the image, containing the text.

Part B

Human Rights
and
Environmental
Impact of the
Proposed Project



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Photograph by Rajaraman Sundaresan



The Project

This is a project for mining of bauxite, with Proposed Bauxite Production Capacity of 9.00 MTPA, Total Excavation is 18.00 MTPA, along with Installation of 2 Crushers with the capacity of 1200 TPH at Thuamul Rampur and Kashipur Tehsils, in Kalahandi and Rayagada Districts of Odisha, respectively.¹⁹⁷ The project proposal proposes the open cast mining-mechanized method for the extraction of the Bauxite ore. The mining process involves removal of top soil and extraction of the ore through controlled blasting and by the usage of a rock breaker. In the proposed mining process, the primary product, Bauxite Ore extracted, amounts to 9.00 MTPA. The by-products generated include 0.18 MTPA of topsoil, 7.4 MTPA of waste, and 1.42 MTPA of sub-grade materials.¹⁹⁸

¹⁹⁷ Draft EIA Report (n 2) Chapter 2, “*Project Description*”, Para 2.1.

¹⁹⁸ *ibid.*

Geographical Area & Location

The Sijimali Bauxite Mine is located at Thuamul Rampur and Kashipur Tehsils in Kalahandi and Rayagada districts of Odisha. According to the EIA report, the proposed mine site with an area of 1549.022 ha, covers the following 18 villages: Malipadar, Dumerpadara, Katibhata, Kutamal, Pelanakona, Aliguna, Bundel, and Shagabari of Kashipur Tehsil in Rayagada District, and Tijmali, Chulbadi, Ambajhola, Mahajal, Nakarundi, Taramundi, Uparambpadar, Salebali, Tadadei, and Talambpadar of Thuamul Rampur Tehsil in Kalahandi District.¹⁹⁹

As per environmental clearance proposal, the total area used is 1549.022 ha, out of which forest area is 157.901 ha, non-forest area is 1391.121 ha. This was subsequently changed as per the revised certified land schedule published in the forest clearance proposal, with the project covering a land area of 1550.412 ha of land out of which forest area is 699.654 ha and non-forest area is 850.758 ha.²⁰⁰

There is no National Park, Wildlife Sanctuary, Biosphere Reserves, Tiger Reserves and Wildlife Corridors, Reserve & Protected Forest etc. within 10 km radius of the mining lease area.²⁰¹ There is a wildlife sanctuary, Karlapat Wildlife Sanctuary which is located at 12.723 km distance in North direction and its proposed ESZ is located at 11.621 km distance in North direction from the proposed Sijimali Bauxite Mine.²⁰² The area forms a segment of the East-Central part of the Eastern Ghat hill ranges.²⁰³ The core area of the mine mainly comprises vegetation/plantation (726 ha), Open Scrub/Waste Land (685 ha), Agricultural Land (119 ha), Road (17 ha), Settlement (2.01 ha), and Surface Water Bodies (0.01 ha).²⁰⁴

The central and south-eastern region of the mine area is in a series of hills ranging between an elevation between 900 m and 1217 m, while the western and northern region of the area is located within a relatively flat topography.²⁰⁵ The Kalahandi

¹⁹⁹ *ibid*, Para 2.3.

²⁰⁰ *ibid*, Para 2.3.1.

²⁰¹ Draft EIA Report (n 2) Chapter 3, “*Description of the Environment*”, Para 3.2, Table 3.1.

²⁰² *ibid*, Para 3.16.3.2.

²⁰³ Draft EIA Report (n 2) Chapter 2, “*Project Description*”, Para 2.7.2.2.

²⁰⁴ *ibid*, Chapter 3, “*Description of the Environment*”, Para 3.6.4.1.

²⁰⁵ *ibid*, Para 3.9.

region is at extremes in terms of the climate facing extreme dryness except during the monsoon season. The Rayagada district experiences tropical climate. The region experiences good rainfall, except during the winter season.²⁰⁶

In a reply to the observation raised in the EAC meeting, the Project proponent clarified that the villages of Malipadar and Bundel do not fall under the ESZ of Karlapat Wildlife Sanctuary and these are different from the revenue villages of Malipadar and Bundel of Sijimali Bauxite Mine. The Project proponent has further clarified that according to the authenticated map obtained from the Forest Department, the minimum distance of Karlapat Wildlife Sanctuary from Malipadar Village is 13.56 km and from Bundel Village is 19.41 km.²⁰⁷

Social Profile of Proposed Mining Area

The total population of Thuamul- Rampur is 77,840 persons as per the Census data of 2011.²⁰⁸ The average sex ratio of the region is 1,042 females per 1,000 males. Scheduled Castes ('SC') comprise of 19,742 persons of which 10,011 are females and 9,731 are males. Scheduled Tribes ('ST') are 45,287 in total with 23,211 being females and 22,076 being males. The primary STs in the region include Kondh, Paroja, Munda, Kondadora, and Korua, while the major SCs consist of Dom, Ghasi, Kandara, and Relli.²⁰⁹ Majority workers are employed in the agricultural sector having close connection with land.²¹⁰

²⁰⁶ *ibid*, Para 3.10.

²⁰⁷ Terms of Reference Grant Letter, 14 August, 2023, Annexure, Page 14.

²⁰⁸ Thuamul Rampur Block Population (n 14).

²⁰⁹ SC & ST Research and Training Institute, Bhubaneswar, 'Prospective Plan of Action for Sustainable Development of Thuamul Rampur ITDA During 11th Plan Period (2007-08 to 2011-12), Tribal Digital Document Repository, *available at* https://repository.tribal.gov.in/handle/123456789/74471?viewItem=search&cat_handle=123456789/73706.

²¹⁰ Main workers: Male- 9,729 Female- 3,582 Total 13,311
Cultivators: Male- 3,985 Female- 759 Total- 4,744
Agricultural workers: Male: 3,495 Female-1,823 Total: 5,318
Household industries: Male- 190 Female: 63 Total: 253
Other workers: Male- 2,059 Female- 937 Total-2,996
Marginal Workers: Male- 9,892 Female: 14,384 Total: 24,276
Non-working population: Male- 18,492 Female- 21,761 Total- 40,253.

The population of Kashipur totals 70,542 individuals according to the 2011 Census data.²¹¹ The average sex ratio in the region stands at 1,071 females per 1,000 males. SCs constitute 14,602 persons, comprising 7,499 females and 7,103 males. STs, on the other hand, total 41,450 individuals, with 21,664 females and 19,786 males. The region has a predominantly Hindu practicing population with around 99.62% following Hindu religion. Majority workers are employed in the agricultural sector having close connection with land.²¹²

However, this demographic information is notably absent in the proposal, the draft EIA report, or the Wildlife Conservation Plan. Hence, the draft EIA report does not accurately address the scale of impact on people, which is the purpose of an EIA report.

Resource Requirements of the Project

Bauxite mining is heavily land-, water-, electricity-intensive, and generates high volumes of toxic and non-toxic waste. Mining projects require heavy infrastructure for extraction, crushing, and refining, as well as for water, electricity, transportation, waste disposal, and townships for employees and workers. The current proposal is limited solely to ore extraction and crushing. As per the proposal, it is dependent on groundwater sources and the pre-existing electricity sub-station at Lanjigarh. For refining also, it depends on the pre-existing refinery in Lanjigarh. For transportation, it proposes setting up some new infrastructure in the EIA Report, but otherwise relies on pre-existing road and rail networks.

Land Requirements

The land requirements can be categorized into five categories: for mining/extraction of the ore, for the establishment of crushers, for transportation, for social infrastructure, for storage, and for waste disposal –

²¹¹ 'Kashipur Block Population, Caste, Religion Data – Rayagada district, Odisha', Census India, *available at* <<https://www.censusindia.co.in/subdistrict/kashipur-block-rayagada-odisha-3177>>.

²¹² Main workers: Male- 11,033 Female- 3,114 Total- 14,147

Cultivators: Male- 6,346 Female- 1,412 Total- 7,758

Agricultural workers: Male- 3,014 Female– 1,210 Total- 4,224

Household industries: Male- 106 Female- 23 Total- 129

Other workers: Male- 1,567 Female- 469 Total- 2,036

Marginal Workers: Male- 7,079 Female- 14,146 Total: 21,225

Non-working population: Male- 15,947 Female- 19,223 Total- 35,170.

- a. *For mining/ extracting the ore:* The project proposal highlights the total use of the project area as 1205.13 ha of land for the excavated area, which will be backfilled and rehabilitated through plantation and regrassing once the mine exhausts itself. At the conceptual stage, a greenbelt spanning 32.87 ha will be developed along the 7.5-m periphery of the mine, while an additional 311.022 ha will remain undisturbed.²¹³
- b. *For transport:* The proposal outlines that crushed bauxite ore will be transported to the Leliguma railway station by road.²¹⁴ From the Leliguma station, it will then be transported to the Lanjigarh alumina refinery by rail.²¹⁵ The draft EIA report mentions that the SH-44 is currently situated 1.5 km west of the mine boundary. A road extending 7.5 km from the mining site to the SH-44 is proposed to be constructed by the Project proponent.²¹⁶ As this road traverses through forested areas, obtaining forest clearance is necessary.²¹⁷ It has also proposed to widen and strengthen the road from Mandibisi-Sikarpai Chowk to Leliguma Railway station.²¹⁸
- c. *For storage:* During the mining process, excess ore extracted may be stored temporarily due to unforeseen circumstances such as heavy rainfall, transportation delays, or temporary halts in the refining process.
- d. *For waste disposal:* Throughout the extraction of bauxite ore, substantial amounts of waste, including topsoil and subgrade, are generated, which are typically reused. Therefore, land is required for storing the generated waste. However, no specific mention of this requirement was provided in the Environmental or Forest clearance proposals.
- e. *For Social Infrastructure:* As per the draft EIA report, the mine site is equipped with metaled roads, railway connectivity, and regular power supply. However, the majority of regions lack social infrastructure, such as educational centers and hospitals.²¹⁹ Additional infrastructure is needed, including the establishment of a Greenbelt to mitigate pollution. The draft

²¹³ Draft EIA Report (n 2) Chapter 2, “*Project Description*”, Para 2.7.4.4.

²¹⁴ *ibid*, Chapter 4, “*Anticipated Environmental Impacts and Mitigation Measures*”, Para 4.5.1.2.8.

²¹⁵ *ibid*, (n 2) Annexure XIII, “*Traffic Study Report*”, Para 2.0.

²¹⁶ *ibid*, Para 2.1.

²¹⁷ *ibid*, Para 2.2.

²¹⁸ *ibid*, Para 2.1.

²¹⁹ *ibid*, Chapter 3, “*Description of the Environment*”, Para 3.17.8.

EIA report proposes to improve sanitation, education, and hygiene in nearby villages. Moreover, plans include constructing office premises, a township, gardens, internal roads, a temple, clinic areas,²²⁰ and a resettlement colony²²¹ to accommodate displaced individuals.

Electricity Requirements

The draft EIA report outlines the utilization of 4.5 MW of electricity, which will be sourced from Diesel Generators and/or the nearest substation in Kashipur.²²²

Water Requirements

The water requirements will be met through groundwater, surface water, and mine sump, totalling 725 kilolitres per day ('KLD').²²³

At the initial stage, the project would require 480 KLD of water, consisting of 380 KLD of fresh water sourced from bore wells and 100 KLD of treated water. The water requirements according to the draft EIA report are as follows: 180 KLD for dust suppression (150 KLD of fresh water and 30 KLD of treated water from washing), 80 KLD for drinking/domestic use, 150 KLD for greenbelt/plantation (80 KLD of fresh water and 70 KLD of treated water from sewage treatment plants), 40 KLD for vehicle washing, and 30 KLD for other activities.²²⁴

After 5 years, the production of bauxite would be gradually increased, requiring 725 KLD of water, with a fresh water requirement of 575 KLD and 150 KLD of treated water. Appropriate permission would be obtained before withdrawing the water. According to the draft EIA report, water from bore wells cannot be used for drinking and domestic purposes. The water requirements outlined in the draft EIA report are as follows: 280 KLD for dust suppression (230 KLD of fresh water and 50 KLD of treated water from washing), 120 KLD for drinking/domestic use, 225 KLD for greenbelt/plantation (125 KLD of fresh water and 100 KLD of

²²⁰ *ibid*, Annexure VIII, “*Biological Study Report*”, 9.B., Table 16.

²²¹ *ibid*, Annexure XI, “*Brief Note for Rehabilitation & Resettlement*”, Para 1.12.

²²² *ibid*, Chapter 2, “*Project Description*”, Para 2.7.1.2.

²²³ *ibid*, Chapter 11, “*Summary and Conclusion*”, Para 11.12.1.

²²⁴ *ibid*, Chapter 2, “*Project Description*”, Para 2.7.1.1.

treated water from sewage treatment plants), 60 KLD for vehicle washing, and 40 KLD for other activities.²²⁵

In the study area, there are 9 water bodies classified as surface water, including Chauladhoba Nallah, Naragul Nallah, Barha Nadi, Panamunda Nallah, Khadiapani Nallah, Dundapata Nallah, Naghulu Nadi, Ghudhughdnuva Nadi, and Sujingabandha Nallah, located 0.4 km to 8 km from the mine site.²²⁶ According to the draft EIA Report, only 2 water bodies, Barha Nadi and Ghudhughdnuva Nadi, contained water during the sampling period i.e., during the summer season (March-May 2023), while the others were dry.²²⁷ This is a major shortcoming of the report because the study on the water bodies is conducted in pre-monsoon period when most of the water bodies are dry. The draft EIA report mentions that the nine water bodies that are at a distance of 0.4 km to 8 km are seasonal in nature.²²⁸ By not conducting the study on water bodies in the other seasons, the report ignores the impact on them over different periods of time in the year.

Regarding groundwater, villages surveyed during the summer season included Kutamal, Upa Ampadar, Taramundi, Aliguna, Sagabari, Nagarundi, Taradeigan, Melaghara, and Arhatakiri. The groundwater in these areas was found to be potable, and villagers rely on it for drinking purposes.²²⁹ Additionally, most villages have tanks, ponds, hand pumps, tubewells/borewells, nallahs, and springs as major sources of water.²³⁰

Current Status of the Project

Mining Lease

The Mining Lease is acquired subsequent to obtaining a reconnaissance permit and prospecting license. Section 6 of the MMDR stipulates the maximum area for which a prospecting license or mining lease may be granted, while Section 7 governs the periods for which prospecting licenses may be granted or renewed. Both processes were conducted by L&T, the previous Project proponent.

²²⁵ *ibid.*

²²⁶ *ibid.*, Chapter 4, “Anticipated Environmental Impacts and Mitigation Measures”, Para 4.5.3.1.

²²⁷ *ibid.*, Chapter 3, “*Description of The Environment*”, Para 3.14.1.

²²⁸ *ibid.*, Chapter 11, “Summary and Conclusion”, Para 11.9- Water Environment, Pg. No 223.

²²⁹ *ibid.*, Para 3.14.3.

²³⁰ *ibid.*, Para 3.17.8.6.

However, the timeline for the reconnaissance permit and prospecting license is not available in publicly accessible documents. There is no recorded information regarding when reconnaissance was conducted, when the prospecting license was issued, and the date of mineral exploration in the area. According to the MMDR, only after completing these processes, an e-auction is conducted. The Project proponent has only provided the date when the mine was granted through the e-auction.

The mining area block was awarded to the Project proponent through an e-auction dated 9 February 2023 and the proponent was declared as the “preferred bidder” under Rule 9(9)(iii) or Rule 10(1A) of Auction Rules. On 24 February 2023, the Project proponent was declared the “successful bidder” after the payment of the 1st installment of INR 146.06 Crores. A Letter of Intent under the MMDR was issued by the Government of Odisha on 1 March 2023, valid until 28 February 2026.

The Mining Plan, along with the Progressive Mine Closure Plan (‘PMCP’) for the Sijimali Bauxite Deposit covering an area of 1549.022 ha, was approved by the Indian Bureau of Mines.²³¹

Environmental Clearance

The project proposal was submitted on 24 March 2023, and on 25 March 2023, the Project proponent applied to the Ministry of Environment, Forest and Climate Change (‘MoEFCC’) for environmental clearance. Essential documents were requested by the MoEFCC on 21 April 2023, to which the Project proponent responded on 04 May 2023. Subsequently, on 16 May 2023, the proposal was accepted.

The Environment Appraisal Committee (‘EAC’) has reviewed the proposal for the current project in two meetings, specifically on 30 May 2023, and 11 July 2023. The concerns addressed in the first meeting were responded to by the Project proponent during the second meeting held on 11 July 2023. Based on it, the EAC issued the Terms of Reference (‘ToR’) for the conduct of the EIA on 14 August 2023.

The EIA was conducted by a private consulting firm named M/S JM EnviroNet Ltd. The draft EIA report was submitted in August 2023. Subsequently, the

²³¹ Letter number MCDR-MiFL0BXT/4/2023-BBS-IBM_RO_BBS on August 16, 2023.

Odisha State Pollution Control Board (“OSPCB”) initiated the process for public hearings as mandated under clause 7(i) III (i) of the EIA Notification dated 14 September 2006. The notification for the public hearings was published in “The Times of India” (a major national Daily) and “The Dharitri” (a regional vernacular Daily in the Official State Language) on 14 September 2023.²³² The public hearings took place on 16 October 2023 in Rayagada and on 18 October 2023 in Kalahandi. It appears that the signatures of participants were obtained as required under clause 6.1 of Annexure IV of the EIA Notification. However, the document uploaded on Parivesh only includes a portion of the signatures, containing 11 names and 13 names from the Kalahandi and Rayagada hearings, respectively.²³³ Regarding other requirements related to public consultations under the notification, there is no available information in the public domain to confirm or deny whether they have been complied with.

Currently, the Project proponent is awaiting Appraisal (Stage IV). As of the date of this report, no meeting has been scheduled for the same. Consequently, the project is currently pending environmental clearance.

Forest Clearance

The project proponent has submitted a proposal for forest clearance under the Forest Conservation Rules 2022, on 29 May 2023 vide proposal no: FP/OR/MIN/QRY/431317/2023. This was then referred to the Project Screening Committee (no date available). In the 14th meeting of the PSC held on 02 June 2023, the PSC rejected the proposal, giving a detailed list of nineteen points for their rejection. Several of these objections related to non-compliance with mandatory guidelines relating to compensatory afforestation (“CA”), mining plan, land use, relief and rehabilitation, and livelihood impact, as well as details regarding the ecology and tree composition in the mining area. Subsequently, it was referred to the Project Screening Committee, although the date of this referral is unavailable. During the 14th meeting of the Project Screening Committee held on 02 June 2023, the proposal was rejected. The rejection was accompanied by a detailed list of nineteen points outlining the reasons for rejection. Many of these objections pertained to non-compliance with mandatory guidelines concerning CA,

²³² Public Hearing Proceedings at Kalahandi (n 8), 1.

²³³ Public Hearing Proceedings at Kalahandi (n 8) 14; Public Hearing Proceedings at Rayagada (n 8) 15-16.

the mining plan, land use, relief and rehabilitation, livelihood impact, as well as insufficient details regarding the ecology and tree composition in the mining area.

The nineteen objections highlight various deficiencies in the forest clearance proposal. These include the absence of crucial documentation such as authenticated maps of the project area and CA land, suitability certificates for CA land, and approval orders for the mining plan. Additionally, essential documents like the Letter of Authority for forest diversion, project approval orders, and cost-benefit analyses were not provided. Discrepancies regarding the validity period of the mining plan, employment generation estimates, plot details, land status certificates, and approved layout plans were also noted. Furthermore, required enumeration lists of trees, resettlement and rehabilitation plans, and undertakings for compensatory measures were lacking, indicating significant gaps in compliance with regulatory requirements.²³⁴

On 02 June 2023, the PSC rejected the application for forest clearance, granting the Project proponent the opportunity to submit a new application after addressing the identified defects. As of writing this report, this new proposal has not yet been filed.

RTI applications reveal that FRA rights settlement and *gram sabha* consent proceedings have also been concluded in at least ten out of the eighteen villages, held on 23 November 2023 and 8 December 2023. On 18 January 2024, the DLCs also issued a NOC for forest diversion on the claim that the rights settlement process is complete and the respective *gram sabhas* have accorded their consent to the proposal.

Pollution Clearances

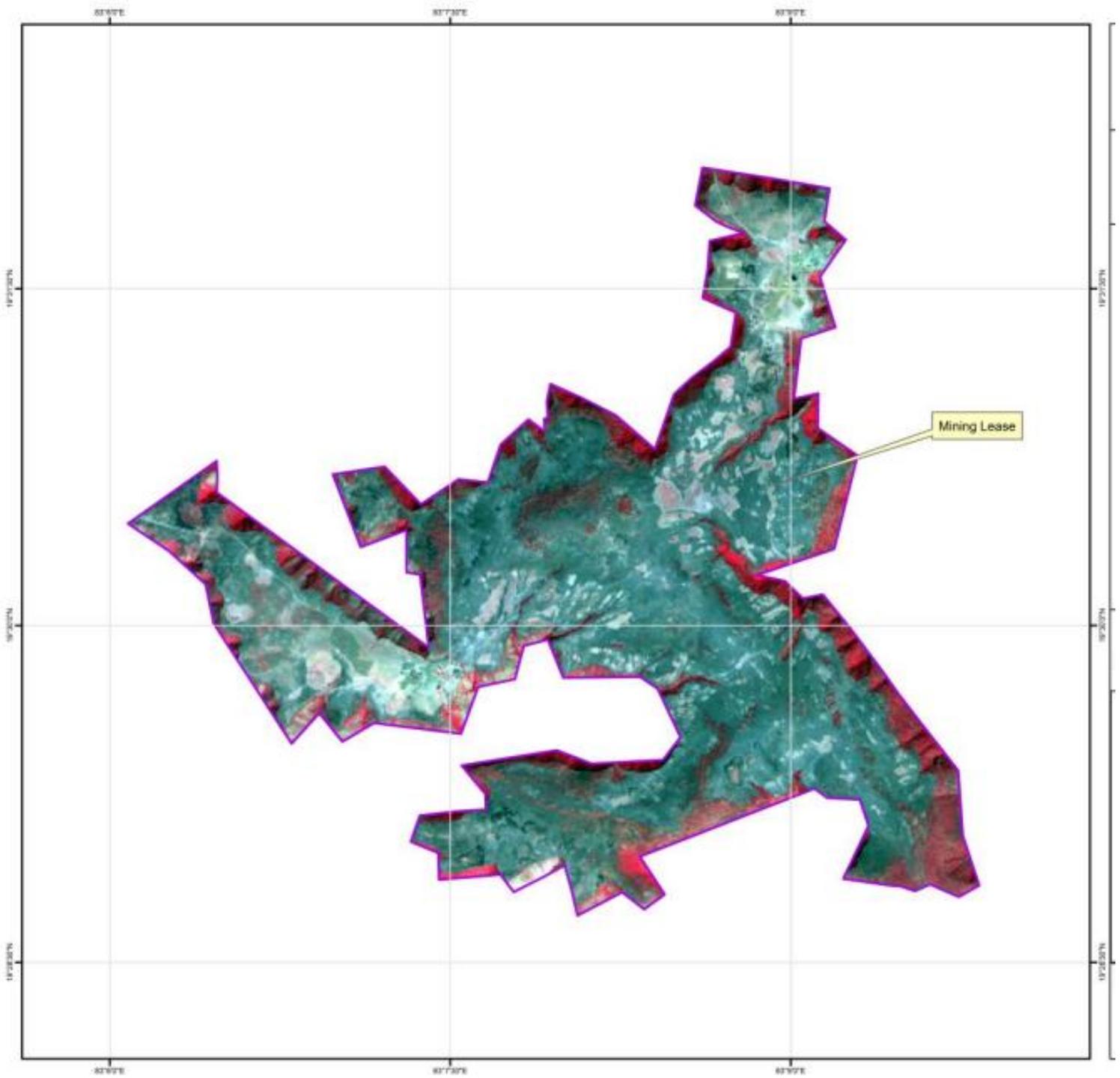
As the CTE/ CTO depend on other clearances, most notably the environmental clearance, this process has not been initiated yet.

Wildlife Clearance

The Project proponent has not sought wildlife clearance, as it claims that the nearest wildlife sanctuary is more than 10 km from the project site.

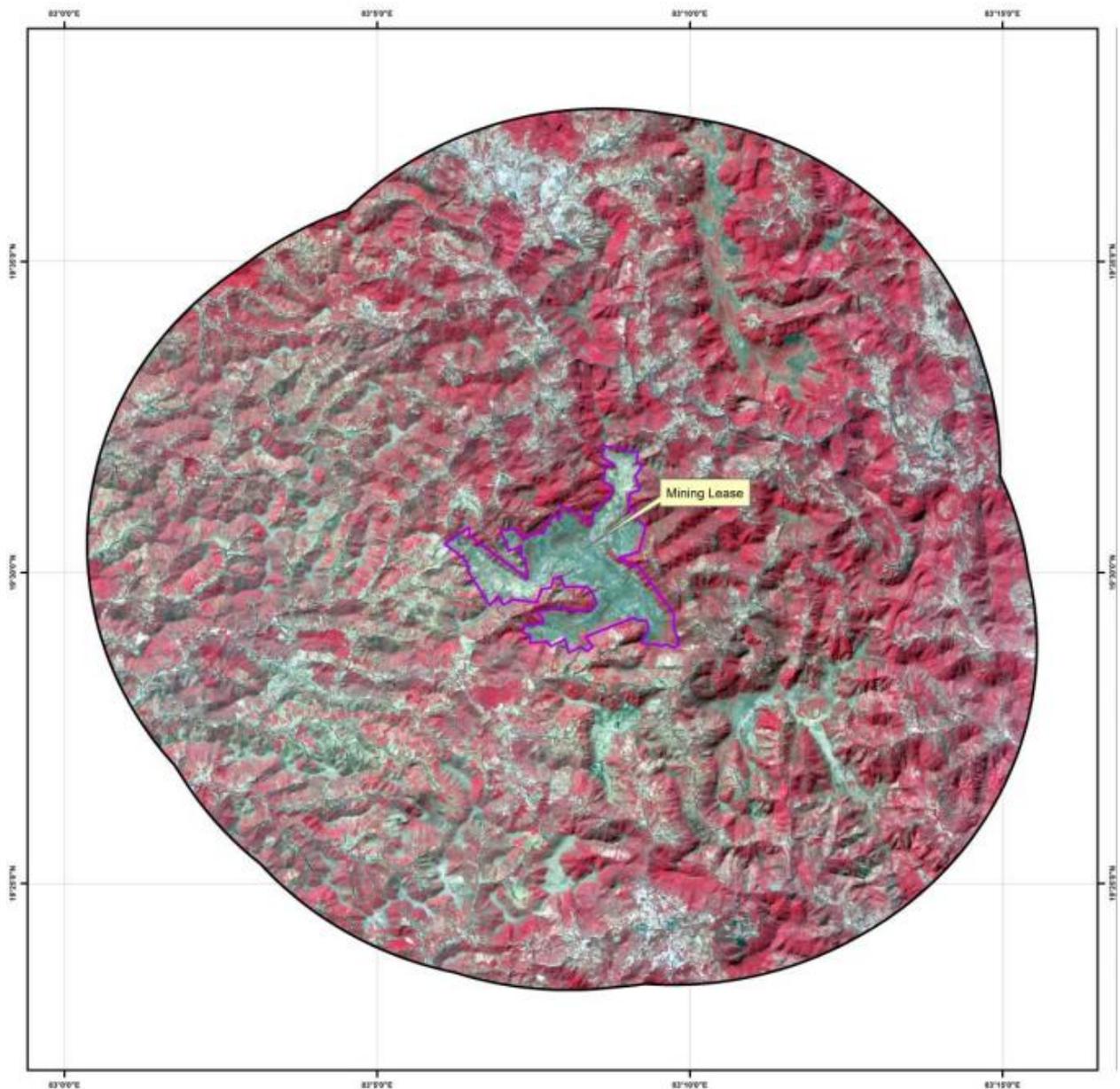
²³⁴ MoM 14th meeting of PSC (n 6).

Satellite Image of Core Zone



(Draft EIA Report at p. 82)

Satellite Image of Buffer Zone



(Draft EIA Report at p. 83)



Environmental Impact of the Proposed Project

In this chapter, we analyse the potential environmental impact of the proposed project in Sijimali, Odisha. To do this, the report scrutinizes project-related documents submitted by the project proponent as available on the Parivesh website, and the draft EIA report submitted by the consultant M/S JM Environet, the Conservation Management Plan (CMP) etc. It also peruses state records contained in the minutes of meetings of various executive bodies such as the EAC, PSC, FAC, DLC etc., the collector's report of the public hearings under the EIA Notification, recorded gram sabha resolutions for diversion of forest land under the FCA etc. The report juxtaposes these sources against responses of affected communities through official and independent documentation such as reports of public hearings, news and civil society accounts, representations made by affected communities to various bodies, as well as secondary literature pertaining to the documented impacts of bauxite mining at other places around the world. Through this triangulation across major sources, the report attempts to overcome limitations imposed by the challenges in primary data collection through fact-finding and ground-truthing. As the clearance processes are still ongoing, the report is based on materials available until 15 January 2024.

Based on a thorough review of all available documents and information, this chapter will be assessing the impact of this project on environment in terms of: impact on land and forests, on wildlife, and on water. The chapter concludes with notes on compliance with the precautionary principle.

Impact on Land and Forests

This section assesses the impact on land and forests. As per the draft EIA report, the total land cover area is 1549.02 ha out of which vegetation/plantation area is 726 ha, open scrub/waste land is 685 ha, agricultural

land is 119 ha, road is 17 ha, settlement is 2.01 ha and surface Water Bodies is 0.01 ha.²³⁵ This impact is assessed on three counts, namely deforestation, loss of fertility, and the management of waste disposal.

Deforestation

The mining process involves excavation of a forest area of 699.65 ha as per the Forest Clearance proposal.

During the whole process of mining, the special habitat of the area gets lost which harbours a vast variety of flora and fauna. The project area boasts a robust flora diversity consisting of 154 species of trees, shrubs, climbers, and grasses. According to the draft EIA report, no endemic, endangered and rare species of flora were recorded in the study area.²³⁶ However, in the public hearings, speakers claim that the proposed mining activity will adversely affect the survival and life of around 73 types of trees that exist in the project area, 21 types of grass, 32 types of Cheramuli, 20 types of Lata, 25 types of medicinal plants, 23 types of Mammals (Stana Paayee Praanee), 11 types of snakes, 53 types of amphibians (Ubhaya Char Pranee).²³⁷ In their initial response, project proponents claim that “*no major tree cutting is involved except herbs, shrubs etc.*” However, the proposed area for the mine is 1549 ha, with 1205.13 ha slated for excavation and 311.022 ha to remain undisturbed. Hence, the plantation and vegetation in this proposed excavated area will also be destroyed.²³⁸

Further, Speaker 1 of the Kalahandi hearings claimed that the Karlapat forest would be affected by the mining activities, of which the affected communities have been the custodian “*from ancient time*”. The project proponent construes this as an allegation that the mine encroaches on the Karlapat Wildlife Sanctuary, and in response claims that “*no Wildlife Sanctuary is fall within 10 km radius of the study area. Karlapat Wildlife Sanctuary is located at 12.723 km distance in North direction and its proposed ESZ is located at 11.621 km distance in North direction from Proposed Sijimali Bauxite Mine.*” In a later report, they reaffirm the same stating “*Total 21 Reserve*

²³⁵ Draft EIA report (n 2) 87, Table 3.4.

²³⁶ Himanshu Nitnaware, ‘Vedanta bauxite mine: Odisha villagers raise concerns at public hearing, accuse company of spreading misinformation’, DownToEarth, 01 December 2023, *available at* < Vedanta bauxite mine: Odisha villagers raise concerns at public hearing, accuse company of spreading misinformation (downtoearth.org.in)>.

²³⁷ Draft EIA report (n 2) 114.

²³⁸ Draft EIA report (n 2) pg.73, Table 2.16.

*Forest fall within 10 km study area and within 10 km radius no Sijimali Forest & Karlapat Forest is falling.*²³⁹ The same also finds mention in the forest clearance process, which are Reserved Forests (‘RFs’), Melaghara RF, Songer RF, Katibhata RF, Mohanagiri RF, Khakes RF, Mohanagiri RF, Bijaynagara RF, Ladakhman RF, Dhanda RF, Kalagan RF, Ajaygarh RF, Ampadar RF, Kospari RF, Kharkhaman RF, Indravati RF, Mandibishi RF, Bijaynagar RF, Reserved Forest, Bijepur RF, Rastugurha RF.²⁴⁰

To address forest excavation in the proposed area, the Environmental Management Plan (‘EMP’) suggests establishing a greenbelt plantation. Initially covering 1238 ha, it includes 32.87 ha along the mine periphery and 1205.13 ha on backfilled areas within the first five years of mining. This plan involves planting over 1.2 million trees to enhance the green cover and serve as biofilters, aiming to counteract deforestation's impacts through compensatory afforestation (‘CA’).²⁴¹

However, critics like Ghosh argue that compensatory afforestation contradicts its purpose. The plan overlooks the multifaceted effects of deforestation, including loss of biodiversity, ecosystem disruption, cultural value, and displacement of forest communities, which cannot be replaced through monoculture plantations that are the norm under CA.²⁴²

Loss of Fertility

Soil health is an important component in determining the health of an ecosystem due to its physical, chemical, and biological support for plant life. It is indicated by factors like presence of nutrients, and pH level, among others. Severe ecological degradation is very common in mining areas.²⁴³ For instance, in the bauxite mining project carried out in Indonesia, the post-mining land was less conducive to support plant growth than the pre-mining land due to degradation of the

²³⁹ State Pollution Control Board, Odisha, Proceedings of Public Hearing conducted at Rayagada District, Doc No. 17792/IND-II-PH-1182, 10 November 2023.

²⁴⁰ Draft EIA report (n 2) pg.77, point 6, Table 3.1.

²⁴¹ Draft EIA report (n 2) 73, 75, 152-153, 164, 208.

²⁴² Soumitra Ghosh, ‘Compensatory Afforestation: ‘Compensating’ Loss of Forests or Disguising Forest Offsets?’, 52(38) Economic & Political Weekly [2017].

²⁴³ Kai Zhung et al, ‘Effects of underground mining on soil-vegetation system: A case study of Different subsidence areas’, 9 Ecosystem and Health Sustainability [2023]; Mrinal K Ghose, ‘Effect of opencast mining on soil fertility’, 63 Journal of Scientific and Industrial Research 1006 [2004].

abovementioned factors.²⁴⁴ Studies of post-mining land in the Qinghai-Tibet plateau suggest similar results. This study also suggests that the effects of mining on soil fertility does not get restored in the early restoration stage but has long-term impacts, even after twenty years of attempts at recovery.²⁴⁵

The draft EIA report assesses the impact on soil health on the abovementioned factors. It, then, indicates that there will be an alteration in the presence of nutrients due to clearing of vegetation and trees coupled with the mining process. This will lead to a loss of fertility of soil and make the area unfavorable for agriculture.²⁴⁶ By remaining confined to loss of fertility, the report does not mention the long-term impact that continues to persist even after the restoration stage, as reflected in the study of the Qinghai-Tibet region. Soil contamination makes the area unfavorable to support agriculture for a longer duration, which then directly affects the livelihood of people dependent on agriculture. The lease period of the project is 31 years. The report does not engage in assessing how the fertility will be restored in this area post the mining project.

This problem was also highlighted in the public hearing for environmental clearance conducted in Rayagada and Kalahandi. However, the pollution control board authorities that have prepared the summary of the hearing remark that the speaker has “*failed to provide any scientific explanation or evidence to her claim.*”²⁴⁷ Hence, the authorities have shifted the burden of proof on the affected communities, instead of the project proponent.

Waste Production

The draft EIA report mentions that 7.40 MTPA of waste and 1.42 MTPA of subgrade will be generated. It further mentions that during the plan period, 13.04 million tonnes of waste will be generated and 1.09 million tonnes of subgrade will be generated. Then, at the conceptual stage, 204.29 million tonnes of waste will be

²⁴⁴ Ricksy Prematuri et al, ‘Post Bauxite Mining Land Soil Characteristics and Its Effects’, Applied and Environmental Soil Science [2020].

²⁴⁵ Yunlong Hu et al, ‘Influence of Mining and Vegetation Restoration on Soil Properties in the Eastern Margin of the Qinghai-Tibet Plateau’, 17 International Journal of Environmental Research and Public Health [2020].

²⁴⁶ Draft EIA report (n 2) 151.

²⁴⁷ This public hearing was conducted on 18 October 2023 at 10.00 A.M at Kerpai Gp Head Quarters, Thuamul Rampur Block, of Kalahandi district: ‘SPCB to MOEF-PH proceedings-KLHD- (1).pdf’, 27 November 2023.

generated.²⁴⁸ All of these waste and subgrade that will be produced will be then used for backfilling. The draft EIA report mentions that usually there is a potential for contamination during operation in the mining lease site area due to overburden dump. However, there is a very little possibility of contamination since there will be no waste dump available on the site. It also mentions that hazardous waste such as HEMM used oil shall be disposed of as per strict adherence of norms along with other recyclable solid waste management.²⁴⁹

While the draft EIA report confines itself to the waste generated during the mining process at the Sijimali site, it does not extend itself to the refining process in the Lanjigarh refinery. During the refining process, when alumina is produced from bauxite, red mud is the waste generated as a part of the Bayer process. Red mud is caustic and its radioactivity content poses a risk to the environment. The adverse impact due to mishandling and poor management of red mud affects human life (causing burning effect due to toxic substances, skin irritation, corrosion, and irritation in eyes etc.), aquatic life (the alkaline, suspended deposits in water leads to deposition on the whole body and gills of aquatic animals), and plant growth (limited nutrient uptake), among others.²⁵⁰

Impact on Wildlife

The destruction of forests in the area prejudices the habitat and survival of wildlife species in the area. The draft EIA report claims to have conducted a comprehensive field study within a 10-km radius surrounding the project area to examine the diversity of plant and animal life in both the land and water ecosystems of the study zone. The study revealed that the area homed a total of 101 faunal species. Out of the 101 faunal species, one species, namely the *Sacred grove bush frog*, is in the Critically Endangered category. Further, four species, namely the Indian Rock Python, the Bengal Monitor Lizard, the Land Monitor, and the Common Boa, were in the Near Threatened category. The Pangolin and the Indian Elephant were in the Endangered category. Further, four species (the sloth bear, the terrapin, the wallago catfish, and the king cobra) were in the Vulnerable

²⁴⁸ Draft EIA report (n 2) 71, 189.

²⁴⁹ *ibid.*

²⁵⁰ Central Pollution Control Board, Guidelines for Handling and Management of Red Mud Generated from Alumina Plants, May 2023.

category. The rest were categorized as of Least Concern according to the IUCN.²⁵¹ The affected communities, however, have claimed that a large variety of these flora and fauna will be endangered due to the proposed mining activity in the said project areas.²⁵²

The Conservation Plan provides that the rehabilitation of wildlife in the mined area will be undertaken by measures that include afforestation, greenbelt development, awareness campaigns, and road signage.²⁵³ However, these may not sufficiently accommodate the loss of habitat of 101 faunal species caused by the mining project. For instance, the Indian pangolin, an endangered species in the project area, is a burrowing animal, and excavating its natural habitat could further endanger its population. How can a compensatory measure, then, account for this loss of an already endangered species?

The Conservation Plan also provides that grazing, forest fire, human interference, illegal trade, poaching, and other factors are threats and challenges to wildlife. It also states that the human-animal conflict is mainly due to degradation of habitat of wild elephants, encroachments etc. because of which they enter human habitation causing damage to life and properties of local inhabitants.²⁵⁴ This section of the draft EIA report conflicts with its own impact of excavation of around 1200 ha of land, hence, destroying the natural habitat of these species. This, in turn, forces them to enter areas of human settlement, leading to man-animal conflict. Hence, it is unclear how the EMP proposes to deal with the problem of human-animal conflict using clearing of the whole plants and vegetation in the area.

Impact on Water

This section assesses the impact of the mining process on water resources. This impact is assessed on two grounds: water usage during the mining process and water pollution caused due to the mining process.

Mining projects require huge quantities of water at different stages. For the usage of surface water, the project proponent claims that they will be using 725 KLD of water. In the public hearing conducted at Rayagada, speakers highlighted that the

²⁵¹ Draft EIA report (n 2) Annexure VIII, pg.25.

²⁵² Himanshu Nitnaware (n 236).

²⁵³ Conservation Plan, 105.

²⁵⁴ Conservation Plan (n 254) 122.

proposed mining project will use a large quantity of surface water for its activity which will subsequently result in the scarcity of drinking water for local communities as well as scarcity of water for agriculture use which will likely affect their livelihood. The draft EIA report also makes note of only one surface water body in the vicinity of the mine area, a *nallah* merely 400 metres away from the site. In their initial response, the project proponent merely claims that “*the mining will be done as per the Norms/ Rules/ Regulations and pollution level will be maintained within prescribed norms.*” The pollution control board authorities that have prepared the summary of the hearing remark that the speaker “*could not substantiate any of these claims scientifically*”.²⁵⁵ In their later response, project proponent seems to suggest that they are not using surface water and provide statistics on their water use, which is primarily groundwater from borewells.²⁵⁶ However, affected communities have claimed that the project would effectively destroy not only their sacred caves but would also cut off the supply of water from Sijimali by destroying about 200-odd streams and their sources.

The process of bauxite mining also generates water pollution as it impacts surface as well as groundwater sources. This is caused due to extensive land clearing, sedimentation, flow of waste water as well as running off of bauxite residues into nearby water streams.²⁵⁷ This causes contamination of drinking water supplies as well as a degradation of aquatic habitats.

The draft EIA report correctly identifies several possible impacts on the water environment that can take place from the mining project and states that appropriate mitigation or water conservation steps would be taken. It states that measures like construction of catch drains, siltation ponds, and retaining walls would be taken up to prevent direct water run-off leading to an increase in turbidity. It also mentions that measures to utilize wastewater, treating sewage water would be taken and wastewater would not be discharged outside the mining lease area to prevent mixing with surface water bodies.

²⁵⁵ Public Hearing (n 247).

²⁵⁶ They claim the water use will be as follows: “During initial 2 years, total water requirement is 480 KLD, same will be sourced from borewells out of which the groundwater requirement is 380 KLD and treated water 100 KLD. After 3rd year onwards total water requirement will be 725 KLD, out of which the groundwater requirement is 575 KLD and 100 KLD treated water. Prior permission will be taken from the competent authority. The water accumulated in the mine pit will be utilized in the development of greenbelt, plantation, dust suppression etc.”

²⁵⁷ Rohan J. Lad & Jay S. Samant, ‘Studies on the impact of bauxite mining on Environment in Kolhapur district’, Proceedings of International Conference SWRDM-2012: Department of Environmental Science 188 [2012].

In the draft EIA report, it is stated that “No surface water bodies exist in the mine lease area. However, in the study area there are 09 water bodies viz. Chauladhoba Nallah, Naragul Nallah, Barha Nadi, Panamunda Nallah, Khadiapani Nallah, Dundapata Nallah, Naghulu Nadi, Ghudhughudnua Nadi, Sujingabandha Nallah (0.4 Km to 8 km) from the mine site.”²⁵⁸ The report also adds that “these water bodies will not be adversely impacted as these are distantly located.”²⁵⁹ However, natural water bodies that contribute to the sustenance of wildlife and their habitats, providing essential resources for a range of species exist at a distance of 0.4 Km to 8 Km from the mine site.²⁶⁰ These water bodies are not only vital for local wildlife but also contribute to the overall ecological balance of the region. Contrary to the claims made by the draft EIA, there are studies that show that water bodies within a 10 Km radius may be impacted due to bauxite mining.²⁶¹ The potential impact on water bodies thus, does not seem to have been addressed.

Project proponent claims that there is only one stream that passes through the proposed project area. However, in the public hearing at Rayagada²⁶² and Kalahandi, 4 speakers claimed that there are in fact over 20 water streams and nallas that emanate from the Sijimali project area.²⁶³ These are: Chauladhoba Nallah, Naragul Nallah, Panamunda Nallah, Jharanakhania nalla, Pani Nalla, Dundapata Nallah, Naghulu Nadi, Ghudhughudnua Nadi, Sujingabandha Nallah, Bada Nadi, Vegiguda Jharana, Mukti Jharana, Saleidanga Jharana, Gunjibali Jharana, Supel Jharana, Jharanapadar Jharana, Panichida Jharana, Udayakana Jharana, Medamjhala Jharana, and Bhalukan Jharana.²⁶⁴ They also added that these streams would be adversely affected due to proposed mining activity.

²⁵⁸ Draft EIA Report (n 2) pg.49 under 4.5.3.1 ‘Impact on Surface Water Bodies and its Mitigation Measures’.

²⁵⁹ Draft EIA Report (n 2) pg.150 under 4.5.3.1.1 ‘Impact on Surface Water Bodies and its Mitigation Measures’.

²⁶⁰ Draft EIA Report (n 2) 150.

²⁶¹ Lad & Samant (n 257).

²⁶² This public hearing was conducted on 16 October 2023 at 10.00 A.M at Trinath Dev High School, Sunger of Kashipur Tahsil of Rayagada district: ‘SPCB to MOEF-PH proceedings-Rayagada.pdf’, 27 November 2023.

²⁶³ These are: Sri Kartika Naik from Banteji village (at serial number 3), Smt. Bharati Naik from Kantamal village (at serial number 4), Smt. Munidei Majhi from Kantamal village (at serial number 8) and Sri Tankadhar Naik from Banteji village (at serial number 13). Two of these speakers (Sri Kartika Naik and Smt. Munidei Majhi) also raised these concerns in the public hearing conducted in Kalahandi on 18.10.2023. The response received was identical.

²⁶⁴ Public Hearing at Kalahandi (n 8) pg 2.

Project proponent, in their response denies the claim and merely states that “*there is no nallah passing through the mine lease.*”²⁶⁵ Hence, the pollution control board authorities that have prepared the summary of the hearing remark that the speakers “failed to provide the source of information regarding the above Nallahs/streams,” yet again casting the burden of proof on the affected communities.²⁶⁶

Based on a scrutiny of diverse sources originating in the project proponent, official authorities, media and civil society, and secondary research, this chapter revealed the manner in which the proposed project has the potential to cause permanent, irreversible and irreparable harm to land, forest, wildlife and water, not only at the site of the mine, but for a radius of at least a dozen kilometre around it. This irreversible and irreparable harm includes the extinction or serious loss of habitat for diverse plant and wildlife species, water depletion and pollution, and permanent loss of soil fertility preventing the natural regeneration of the ecology once the mine is exhausted. These harms cannot be mitigated through patchwork measures of compensatory afforestation or greenbelt plantations.

In the face of threat of such lasting ecological damage, the precautionary principle and public trust doctrine require the state and central governments to reject the project to prevent environmental harm as custodians of natural resources. The precautionary principle is also violated through the ongoing clearance process, as the OPSCB, in response to the public hearings, is forcing the burden of proof on affected communities, instead of undertaking independent analysis of its own, or further scrutinizing the claims of the draft EIA report. This underlines the necessity of urgent independent assessments of the environmental impacts of the proposed mine by environmentalists and CSOs.

²⁶⁵ This response is attached as Annexure II in the document describing the public hearing conducted in Rayagada: ‘SPCB to MOEF-PH proceedings-Rayagada.pdf’, 27 November 2023.

²⁶⁶ These comments are part of the document.



Photograph by Rajaraman Sundaresan



Human Rights Impact of the Proposed Project

This chapter brings attention to the impact of the proposed project on human rights of affected communities. Particularly, this chapter focuses on the fundamental, constitutional and human rights of adivasis and indigenous peoples identified in Part A, namely, the rights to land, autonomy and FPIC, cultural and religious rights, health and livelihood. In the process, this chapter makes observations relating to the overall right to environment and development.

Impact on Right to Land and Forest

Land is not simply an economic asset, but a source of social, cultural and political identity of affected communities. The proposed project covers an area of 1549.022 ha of which 46.37% (699.70 ha) is forest land.

The Table below presents the population figures for the Thuamul Rampur and the Kashipur blocks, where the mine is proposed to be located, as per which the total population of both blocks combined is 1,48,382, constituting 36,398 households, with 59,889 ST population and 61,192 SC population.²⁶⁷

	Population	Households	Male	Female	ST	SC
Thuamul-Rampur	77,840	18,773	38,113	39,727	45,287	19,742
Kashipur	70,542	17,625	34,059	36,483	14,602	41,450
TOTAL	1,48,382	36,398	72,172	76,210	59,889	61,192

²⁶⁷ Draft EIA report (n 2) Cost Benefit Analysis, pg 4; *Thuamul Rampur Block Population* (n 14); *Kashipur Block Population* (n 211).

The draft EIA report only provides the population data of thirteen of the eighteen villages, which it claims fall under the mining area. We were able to extract population data regarding three other villages not covered in the draft EIA report from the Census Reports of 2011, namely, Salebali,²⁶⁸ Tadadei²⁶⁹ and Talambpadar.²⁷⁰ For the remaining two villages, namely, Pelankona and Katibhata, is not available either in the draft EIA report or the Census data perused by us, indicating that these two villages are presently uninhabited. The Table below thus provides population data regarding sixteen out of eighteen villages, based on draft EIA report and our own research into Census Reports 2011.

Village	Household Nos.	Total popn.	Male popn.	Female popn.	ST popn.	SC popn.
Nakarundi	81	362	188	174	233	105
Mahajal	12	64	31	33	64	0
Taramundi	25	128	57	71	115	13
Ambajhola	56	254	122	132	194	59
Tijmali	21	99	45	54	99	0
Uparambpadar	16	70	25	45	64	6
Chulbadi	116	477	215	262	316	80
Dumerpadara	65	257	118	139	170	87
Malipadara	38	143	66	77	143	0
Shagabari	226	756	358	398	384	261
Aliguna	47	147	67	80	147	0
Bundel	52	203	105	98	145	52
Kutamal	117	469	222	247	387	80
Salebali	5	20	13	7	20	Nil
Tadadei	30	147	62	85	147	Nil
Talambpadar	107	419	193	226	266	90
TOTAL	1,014	4,015	1,887	2,128	2,894	833

²⁶⁸ ‘Salebali Population, Caste, Working Data Kalahandi, Odisha – Census 2011’, Census India, *available at* <<https://www.censusindia.co.in/villages/salebali-population-kalahandi-odisha-424338>>.

²⁶⁹ ‘Tadadei Population, Caste, Working Data Kalahandi, Odisha – Census 2011’, Census India, *available at* <<https://www.censusindia.co.in/villages/tadadei-population-kalahandi-odisha-424343>>.

²⁷⁰ ‘Talambpadar Population, Caste, Working Data Kalahandi, Odisha – Census 2011’, Census India, *available at* <<https://www.censusindia.co.in/villages/talambpadar-population-kalahandi-odisha-424359>>.

Accordingly, at least 1,014 households, comprising 4,015 individuals, with 1,887 and 2,128 women, stand to be impacted directly by the project, as per the project proponent's own claims about the number of affected villages. Concerns over the accurate identification of risks and the project's impact on the environment and local communities persist, with activists and locals disputing the reported number of affected villages to be more than fifty rather than eighteen as claimed in the draft EIA report.²⁷¹

Violation of forest rights

The draft EIA report is silent on the forest rights of affected communities in these eighteen villages. As STs and OTFDs, all these households inhabiting forest land are entitled to vested forest rights under Section 3(1) and Section 4(1) of the FRA, including IFR at the household level with joint titles in the name of the married unit or single women, CFR at the level of village *palli sabhas* as well as other collective rights over forest commons.

Both Rayagada and Kalahandi are also Scheduled Areas under the Fifth Schedule, thereby, recognizing their constitutional rights over customary lands and forest resources, as well as the right to autonomy and self-governance by customary institutions.

Rayagada district has a total of 2,26,144 households. Out of these only 28,248 households have been distributed Individual Forest Rights ('IFR') until 31 January 2024. Therefore, at the district level 87.5% of IFR have still not been recognized. A total of 365 Community Forest Rights (CFR) have been recognized at the district level over the same time period.²⁷²

Kalahandi district has a total of 4,01,251 households. Out of these, only 11,041 households have been distributed IFR, according to the DLC MoM. Therefore, at the district level 97.24% of IFR have still not been recognized by the state. A total

²⁷¹Subhashish Mihanty, 'Odisha: Public Hearing for Sijimali Bauxite Block despite Protest of Tribals', The Telegraph Online, 17 October 2023, available at <<https://www.telegraphindia.com/india/odisha-public-hearing-for-sijimali-bauxite-block-despite-protest-of-tribals/cid/1973828>> accessed 06 January 2024.

²⁷² SC & ST Department, Government of Odisha, Monthly Progress Reports under the Scheduled Tribes and Other Traditional Forest-Dwellers (Recognition of Forest Rights) Act, January 2024.; also see Community Forest Rights Learning & Advocacy Process, 'Odisha: Promise and Performance of the Forest Rights Act, 2006', Rights+ Resources, 31 May 2017, available at <https://rightsandresources.org/wp-content/uploads/2017/05/Promise_Performance_FRA_Odisha.pdf> accessed 31 March 2024.

of 185 Community Forest Rights have been recognized at the district level, according to the SC&ST Department, Government of Odisha, Monthly Progress Report under FRA. The MPR do not provide the tally for the village level data, but, nevertheless, from the district level data we can still see deficit in recognizing rights of people.

The village of Tijimali has a total of 21 households, but according to the DLC MoM, only 16 households have been distributed the IFR at the last meeting held on 18 January 2024.²⁷³ Therefore, 23.8% of IFR have still not been recognized by the state. The village of Chulbadi has a total of 116 households, but according to the DLC MoM, only 16 households have been distributed the IFR. Therefore, 86.2% of IFR have still not been recognized by the state.

Additionally, concerns over the accurate identification of risks and the project's impact on the environment and local communities persist, with activists and locals disputing the reported number of affected villages to be more than 50 rather than 18 as claimed in the draft EIA report.²⁷⁴

Under Section 4(5) FRA, no person may be evicted or displaced from their lands until the rights settlement process is complete. In fact, the unlawful displacement or dispossession of SCs and STs from their forest rights constitutes an atrocity under Section 3(1)(f) and (g) of the SC/ST (Prevention of Atrocities) Act 1989 as amended in 2016.

Forced Displacement

According to the environmental clearance proposal, the project would displace one hundred families and affect five hundred families, and makes proposals for the rehabilitation and resettlement of eighteen villages. This is also ratified by the draft EIA report, although neither of the two documents provide a source for arriving at these figures. Evidently, from the population figures recounted above, more than a thousand households stand to be impacted by the project. The project proponent projects less than half of these figures.

²⁷³ Proceedings of the District Level Committee, Kalahandi dated 18 January 2024.

²⁷⁴Subhashish Mihanty, 'Odisha: Public Hearing for Sijimali Bauxite Block despite Protest of Tribals', The Telegraph Online, 17 October 2023, available at <<https://www.telegraphindia.com/india/odisha-public-hearing-for-sijimali-bauxite-block-despite-protest-of-tribals/cid/1973828>> accessed 06 January 2024.

The mining project will lead to the deprivation of forest rights, as the natural resource would be depleted, and the locals would be forcefully displaced. The dispossession of *adivasis* from their land would negatively impact their right to housing, adversely impact their health, livelihood, and infringe on their rights, including the right of ownership, use, protection, and management of their land. Forcible displacement of the community from their land, on which their livelihood and culture depends, causes irreparable harm to their identity, and also increases their vulnerability to exploitation, chronic malnourishment, starvation, psychological trauma, and ill health. The mining project not only severs the community's relationship with their land but also endangers their custom, usage, forms, practices, and ceremonies as forest dwellers. This results in worsening of the development indicators in the region.

Forced displacement resulting from rehabilitation and resettlement plans would severely undermine the agency of affected communities, subjecting them to navigate an arbitrary state bureaucracy for redressal, while compensation determinations often favor men, disregarding women's substantial land ownership.²⁷⁵ *Adivasi* women, thus, lose their social status, as they are forced to give up their economic independence and their right to common property resources.²⁷⁶ This process disrupts the social fabric, dismantles production systems, and scatters kinship groups, leading to feelings of alienation and powerlessness. Inadequate rehabilitation measures further compound the situation, with only a fraction of the displaced receiving proper rehabilitation. Moreover, multiple displacements exacerbate instability, with reports documenting deaths due to starvation among resettled populations. Such displacement not only harms livelihoods but also contributes to the decline of self-sustaining communities, leading to systemic unemployment and poverty.

Impact on Right to Autonomy and Self-Governance

Violation of Fifth Schedule guarantees

All affected villages fall under Scheduled Areas declared under the Fifth Schedule of the Constitution, under which communities have a right to autonomy and self-

²⁷⁵ Biswaranjan Mohanty, 'Displacement and Rehabilitation of Tribals', 40 (13) Economic and Political Weekly 130 [2005].

²⁷⁶ Debasree De, 'Impact of Development-induced displacement on the Tribal community, with special reference to the women in Odisha of the women in Odisha', 4(2) ASEAN Journal of Community Engagement 111 [2020].

governance over customary land and forests through customary institutions such as the *palli sabha* in Odisha. The Fifth Schedule also encodes prohibitions on alienation of Scheduled Area lands also protect the integrity and contiguity of *adivasi* lands in the interest of collective rights of autonomy and self-governance. The Orissa Regulation of 1956 enacts this prohibition on land alienation in Scheduled Areas, and the *Samatha* judgment of the Supreme Court in 1997 clarified that this encompasses prohibition on land alienation to State and private corporations as well. In addition, the LARR Act in Section 41 further prohibits acquisition of land in Scheduled Areas, unless absolutely necessary where there are no other alternatives. Nevertheless, the project has been proposed in these Scheduled Areas, without adequate justification, and only a token reference to the non-availability of the mineral elsewhere. The draft EIA report does not mention if these alternatives were actually explored. The draft EIA report is, in fact, completely silent of the impact of the proposed project on autonomy and self-governance rights of *adivasis*.

Violation of FPIC

FPIC requires free, prior and informed consent of *gram sabhas* for any activity on their customary land and forest resources. In the current instance, both, the legal regime as well as the course of proceedings for the current project severely violate FPIC.

The MMDR process is conducted almost entirely between the State and businesses, with hardly any avenue for information and representation of *adivasis* and other affected communities, such that mineral exploration and grant of mining lease over customary lands can be conducted entirely without informing them. However, Section 4(k) PESA mandates *gram sabha* consultations for grant of mining lease. We were not able to obtain information from Parivesh whether and in what manner these proceedings were conducted.

Affected communities are also not informed once the project proponent initiates various clearance processes, and the matter is tabled before relevant committees under law, nor when the ToR for EIA are drawn up or the EIA actually conducted by external consultants. Affected communities are informed of any proposed project, by law, only once the draft EIA report is submitted to the SPCBs, upon which public hearings are called. This is at a substantially delayed stage of the

process, and not *prior* to the commencement of the decision-making process over customary lands.

Under the current project as well, there is evidence to suggest grave violation of FPIC on the ground, both for the public hearings under the environmental clearance process, as well as FRA rights settlement and consent proceedings as part of the forest clearance process.

Since early-August 2023, marking the eve of public hearings scheduled for October 2023, several villages in Rayagada and Kalahandi district, including Kashipur block, witnessed widespread police action in the form of midnight raids, disruption of public assemblies, arrests of community leaders, illegal detentions and increased police deployment.²⁷⁷ The police have also filed multiple open-ended FIRs against hundreds of named and unnamed others under the IPC as well as the anti-terror law UAPA on charges of terror, rioting, attempted murder and abduction. Upendra Bagh, along with 8 others, have been named in an FIR under the Unlawful Activities (prevention) Act ('UAPA') and other provisions of IPC. These FIRs under UAPA include senior leaders like Ladda Sikaka and Drenju Krushka, youth leaders like Manu Sikaka and Samba Huikia, and other activists namely, Gobinda Bag, British Naik, Lenin Kumar, and Upendra Bag.²⁷⁸ When the public hearings were conducted in October 2023, twenty-two persons were still arrested under various provisions of the IPC including key leaders of local organizations.

The OSPCB-organized public hearings, as opposed to the statements of officials, saw heavy police patrolling.²⁷⁹ More than 4000 people have been reported to have expressed their opposition to the project through protest with placards asking "Vedanta-Mythri go back!".²⁸⁰

²⁷⁷ Sundaresan (n 9); Coerced Gram Sabhas (n 11).

²⁷⁸ 'Free Niyamgiri! Stop Arrests, Illegal Detentions and Attacks on NSS and the People of Kashipur!', PUDR, 21 August 2023, *available at* < <https://www.pudr.org/press-statements/free-niyamgiri-stop-arrests-illegal-detentions-and-attacks-on-nss-and-the-people-of-kashipur/>> accessed 31 March 2024.

²⁷⁹ Press Trust of India, 'Public Hearing Held in Odisha For Vedanta's Proposed Bauxite Mine Amid Protests', Outlook Business, 17 October 2023, *available at* <Public Hearing Held In Odisha For Vedanta's Proposed Bauxite Mine Amid Protests (outlookindia.com)> accessed 15 January 2024.

²⁸⁰ Debabrata Mohanty 'Public Hearing for Vedanta's Mining Ends Abruptly amid Opposition by Villagers', Hindustan Times, 16 October 2023, *available at* <Public hearing for Vedanta's mining ends abruptly amid opposition by villagers - Hindustan Times> accessed 06 January 2024.

The public hearings were thus not conducted freely, having been held in an environment of fear, duress through criminal action, and by disabling community leaders and organizations to represent themselves or exercise their rights of assembly and association in relation to the proposed project.

In these public hearings, concerns were raised on the lack of a conduct of a *palli sabha* in the villages before the hearings and at the arbitrary police actions involving the arrest of persons who opposed the project. Multiple FIRs have also been filed against community and village leaders active in the movement against the mining project and were involved in organizing village level committees for implementation of the Forest Rights Acts.²⁸¹ These FIRs have named as well as hundreds of unnamed “others”.²⁸² Record of the public hearings available on *Parivesh* also represent that each speaker uniformly expressed opposition to the proposed project on account of its impact on their customary rights and environment.

The documents highlight that *gram sabha* proceedings for Aliguna, Bandel, Dumber Padar, Mali Padar, and Sagbari were conducted on the same day – 23 November 2023. *Gram sabha* proceedings for two villages, namely Chulbari and Tijimali were also conducted on the same day 08 December 2023 at 11am and 10am, respectively.

These documents reveal that three propositions were placed before the *gram sabhas* for their decision. The first pertained to the settlement of rights under FRA and the issuance of titles. The second pertained to consent for the proposed project, while the last item addressed the construction of physical infrastructure such as community centres, temples etc. within the village. According to copies of these resolutions the *gram sabhas* have unanimously granted their consent to the proposed project, while the project proponent has acquiesced to their requests for community infrastructure under the third proposition.

²⁸¹ ‘Update on the Struggle against Vedanta’s Bauxite Mining at Sijimali’, groundxero, 16 February 2024, *available at* <» Update on the Struggle against Vedanta’s Bauxite Mining at Sijimali (groundxero.in)> accessed on 23 March 2024.

²⁸² Satyasundar Barik, ‘Fight against bauxite mining in Odisha: the view from the hill’, The Hindu, 13 October 2023, *available at* <Fight against bauxite mining in Odisha: the view from the hill - The Hindu> accessed on 23 March 2024.

However, discrepancies in the signatures to these resolutions raise certain questions. For instance, in Chulbari, 213 persons are shown as present in the *gram sabha* meeting, where the total population is 477. Some columns are blank and do not mention any names. Not all names that are mentioned have accompanying thumb impressions or signatures. Similarly, for Tijmali village, 118 persons are shown as present at the meeting, where the total population of the village is only 99. Further, *gram sabhas* were also surprisingly held in two uninhabited villages with no population as per the Census Report 2011, in Pelanakona and Katibhata.

The unanimous consent for the proposed project under proposition two sits at odds with official and media accounts of the public hearings under EIA which were conducted only two months prior to these *gram sabha* proceedings, where almost all those present expressed opposition to the project. This necessitates urgent fact-finding by independent CSOs to verify the validity of these *gram sabha* proceedings. Lastly, the juxtaposition of proposition 1, 2 and 3 also suggests a violation of the FRA, where it appears to be a trade-off between development rights under Section 3(2) FRA and forest rights under Section 3(1) FRA. STs and OTFDs are entitled to both, development and forest rights.

The District Level Committee ('DLC') issued No Objection certificate ('NOC') with respect to divergence of forest land to non-forest purpose in the respective villages on 18 January 2024. Section 6(5) of FRA mentions the constitution of DLC to consider and finally approve the record of forest rights prepared by the Sub-Divisional Level Committee. The DLC, by issuing this NOC, has acted beyond the scope of its power.

Ostensibly, *gram sabha* proceedings for FRA rights settlement and consent under the forest clearance process have also been conducted in ten villages, details of which are not available on Parivesh. However, response to an RTI filed by a local activist have provided *gram sabha* resolutions of these proceedings in ten villages.²⁸³

Impact on Cultural and Religious Rights

The proposed mining area and the nearby region holds a rich socio-bio-cultural diversity inhabiting people who hold rights to practice and preserve the same under Articles 14, 21, 25, 26, 27, 28, 38, 39, 46 and Fifth Schedule of the Indian

²⁸³ Available on file.

Constitution, FRA, and PESA. FRA also gives recognition to the traditional rights of the marginalized groups of people- dependent on the forest resources.

The region, locally referred to as *Sijimali*, gets its name from the supreme deity of the hills, *Tij Raja*. Local communities in this region are closely connected with land and the surrounding nature with regards to its distinct socio-cultural features. Affected communities have on multiple occasions, be it in public hearings or to the media,²⁸⁴ reported that the mining would destroy more than 50 sacred caves, where the locals conduct their religious rituals during different seasons.

The Khond community in the region, majorly offer prayers to the Dharni Penu (the earth goddess), Jatrakudithe (the village deity), Gungi Penu (the stream deity), Bhima Penu (the mountain god), Lai Penu (the forest god), Sita Penu (the deity of wealth) and, Birna Penu (the rain god) amongst others. Meanwhile the Munda community participates in agricultural activities such as harvesting paddy to celebrate their major rituals.²⁸⁵ The mining, would not only destroy the topography of the region, but also the identity, dignity, and knowledge of the people who associate their culture and religion to it. However, such impact on cultural and religious rights of people finds no mention at all in the draft EIA report.

Impact on Right to Health

The draft EIA report maintains a conspicuous silence on the health impacts of bauxite mining and instead notes that the medical facilities in the community need improvement to treat emergencies as per the Census India Handbook of 2011.²⁸⁶ They do not identify the specific health impacts of bauxite mining on the general community and the miners. Hence, the draft EIA report does not identify, the physical, biological, and chemical hazards posed by bauxite mining on the workers.

The project proponent has proposed to increase its CSR activities in the area by providing primary health services covering nearby villages in conjunction with NGOs and the government.²⁸⁷ It has also planned to focus on infrastructure improvement of existing PHCs and SHCs in nearby areas to address general health concerns. These concerns are, however, not related to the mining project. The

²⁸⁴ Public Hearing (n 247).

²⁸⁵ Khond Tribe - Other Distinct Socio-Cultural Features (n 15).

²⁸⁶ Draft EIA Report (n 2) 129.

²⁸⁷ Draft EIA Report (n 2) 156.

health impacts identified by the draft EIA report are general health concerns of the community that need improvement. The interventions proposed by the project proponent in the Environment Management Plan only seek to establish hospitals and fund existing ones to improve infrastructure which *prima facie*, do not identify and respond to the range of long-term, chronic health impacts that may impact the community due to the bauxite mining project.

Mining activities have very specific health impacts for the general community and the mine workers because of constant exposure to dust and pollution that emerges out of such projects. Many of these impacts stated herein are chronic, acute, and long-term.

Aluminium hydroxide is the main content of the bauxite ore. Excessive exposure to the same through water bodies could be detrimental to health as it could cause pain and reddening of the nose, coughing, pain, and redness of the skin along with peeling and itching eyes.²⁸⁸ Heavy metals can also accumulate in food and other water sources and hence, affects the whole food chain.²⁸⁹ For instance, the content of iron oxide in bauxite causes water bodies to become reddish and long-term exposure of the same could lead to the accumulation of iron in the liver tissue, affecting the functioning of the liver system, along with gastrointestinal problems, hepatic disease, and hyperpigmentation. The situation is worsened for people with thalassemia and haemophilia, as they could suffer from swelling of the liver and spleen.²⁹⁰ Chronic exposure to such toxic metals is known to cause multiple organ toxicity and increase the risk of malignancies. Other biological risks include communicable diseases such as dengue and malaria for which appropriate vector control and chemoprophylaxis are needed.²⁹¹

The small particles from bauxite mining released into the environment between PM 10 and PM 2.5 not only contaminate properties, water, and food sources but also are known to irritate the eyes, nose, and throat. They penetrate the respiratory system and have been associated with increased hospitalization for cardiovascular

²⁸⁸Daniel Krewski, Robert A Yokel et.al, 'Human Health Risk Assessment for Aluminium, Aluminium oxide, and Aluminium Hydroxide', 10 (1) J Toxicol Environ Health B Crit Rev 269 [2007].

²⁸⁹Lee KYa, Ho LYa et.al 'Environmental and Occupational Health Impact of Bauxite Mining in Malaysia: A Review', 16 (2) Jeffrey Cheah School of Medicine and Health Sciences, Monash University Malaysia 45 [2017].

²⁹⁰New Jersey Department of Health, 'Hazardous Substance Fact Sheet' (2007). <<https://nj.gov/health/eoh/rtkweb/documents/fs/1036.pdf>> accessed 22 January 2024.

²⁹¹ Hazardous Substance Fact Sheet (n 292).

and respiratory diseases along with premature deaths. Mental stress caused by coping with these conditions is also a form of acute impact that could transition to exhibit chronic effects after prolonged exposure.²⁹²

Chronic exposure to noise pollution, as mining is carried out round the clock, can result in noise-induced hearing loss, loss of hearing sensitivity, and sleep disturbances.²⁹³ Noise has been associated with cardiovascular diseases and additional physiological, behavioural, and cognitive impacts such as long-term chronic cognitive stress. Vibrations due to constant noise can worsen spinal cord disorders.²⁹⁴ Occupational health effects of bauxite mining also includes sleep disturbances which could lead to similar effects impacting behavioural and cognitive performance. Since these mines operate non-stop, fatigue has become an important concern due to long shifts and overtime. Heat exhaustion and miliaria rubra have been additionally reported due to chronic exposure to heat and humidity. The workers also remain exposed to risks of serious burns to the skin and eyes.²⁹⁵ Heavy metals such as lead, arsenic, mercury, and chromium can result in central and peripheral nervous system damage and impair cognitive function, causing hypertension, cardiovascular disease, and result in dermatological manifestations.²⁹⁶

Section 6 of the National Mineral Policy recognizes that since mining operations are at times hazardous, therefore efforts must be directed toward the development and adoption of mining methods that increase the safety of workers and reduce accidents. Steps must be taken to minimize the adverse impact of mining on the health and safety of workers.²⁹⁷

²⁹² Lee KYa, Ho LYa et.al (n 289).

²⁹² Hazardous Substance Fact Sheet (n 291).

²⁹³ *ibid.*

²⁹⁴ *ibid.*

²⁹⁵ Lee KYa, Ho LYa et.al (n 289).

²⁹⁶ *ibid.*

²⁹⁷ National Mineral Policy 2019. The International Aluminium Institute's Sustainable Bauxite Mining Guidelines (2018) also note that sustainable bauxite mines should have employment policies and procedures that include providing employees with clear documentation of their hours of work, wages, overtime compensation, and benefits. With regards to providing a safe and healthy work environment, the guidelines note that a sustainable mine should take steps to prevent accidents, injury, and disease including identifying potential hazards to employees and contractors, particularly those that may be life-threatening. Clear plans must be towards modification, substitution, or elimination of these hazardous conditions or substances to reduce their risk. Such occupational health and safety

While the report identifies the need to medically examine miners and establish adequate sanitation facilities, it does not address the chronic respiratory conditions, chronic fatigue, and, other malignancies that can be caused by effects particular to bauxite mining. These impacts cannot be mitigated but can only be sought to be prevented.²⁹⁸ It also does not provide them rights-based entitlement to adequate safety and contingency plans.

Impact on Right to Livelihood

The project proponent claims that the current project would address the problems of unemployment among the youth and generate ‘sustainable,’ ‘direct’ employment for about 600 persons. The environmental clearance proposal anticipates the generation of 277 permanent and 97 temporary jobs. On the other hand, the forest clearance proposal envisages the generation of 374 permanent and 181 temporary jobs. This is still a long shot from the total population of 4,015 persons of the sixteen out of eighteen villages that the project proponent itself claims will be most directly impacted by the project on account of loss of forest land and commons. The proposal or draft EIA report also do not identify whether this employment generation will be for men or women, which is necessary to clarify given labour segregation in the formal and informal sector.

FRA recognizes the interdependency between forest rights, household and common lands, and the livelihood of communities. Individual or common occupation of most of the community’s members is derived from the land, forest produce and other resources derived from such common property.²⁹⁹ Section 3(1) (a) of the FRA provides forest-dwelling Scheduled Tribes “the right to hold and live in forest land under individual or common occupation for habitation or for self-cultivation for a livelihood by a member or members of a forest-dwelling Scheduled Tribe or other traditional forest dwellers.” Section 3 (1)(c) further vests the “right of ownership, access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries.” Section 3 (1)(d) extends this right by conferring upon the community, “rights of uses or entitlements such as fish and other products of water bodies, grazing (both

aspects should be addressed during all phases of the mining cycle. The mining companies are also required to include in the policy a commitment to comply with Applicable national laws on workers' health and safety.

²⁹⁸ Draft EIA Report (n 2) 162.

²⁹⁹ Forest Rights Act 2006 (“FRA”).

settled or transhumant) and traditional seasonal resource access of nomadic or pastoralist communities.”³⁰⁰

The draft EIA report notes that the majority of the community in both the primary and secondary zones is involved in agricultural and allied sector activities such as animal husbandry and related small-scale businesses. However, only 48% of the population is ‘working’, according to the draft EIA report, - included among them are cultivators, agricultural labourers, and small-scale manufacturing workers. Most of them are unskilled and semi-skilled in their vocations. The occupational structure, it is noted, mostly comprises the unorganized sector. With a significant number of people being employed seasonally (since agriculture is performed only for certain months).³⁰¹

In terms of adverse impacts, the report claims that the project will attract more able-bodied persons from the community (comparatively skilled persons) which would in turn result in reduced labour availability in other sectors of the economy (including agricultural, labor-intensive jobs, etc.). However, it is noted that as of today, the end-use plant and other mines are already operational, and hence, significant additional impact is not to be expected. To cushion the local population against the impacts of mine closure, adequate advance intimation would be given to employees and contractors to allow them to seek alternative opportunities.³⁰²

Additionally, various training programs have sought to be instituted through the project proponent’s CSR obligations to improve the skill set of the labour force. This is claimed to increase the income and overall standard of living of the local community. In addition, Project proponent has proposed to encourage entrepreneurship by awarding services and contracts for activities such as canteens, vehicle hiring, gardens, courier services, and material supplies.³⁰³ The project is also stated to induce the development of ancillary and related small-scale industries in adjoining areas which would contribute towards improving the overall socioeconomic status of the community. The other ways to mitigate impact on livelihood as identified by the draft EIA report include contributions to the District Mineral Foundation Fund (DMF), National Mineral Exploration Trust etc.

³⁰⁰ *ibid*, s. 3.

³⁰¹ Draft EIA Report (n 2) 123.

³⁰² Draft EIA Report (n 2) 123.

³⁰³ Draft EIA Report (n 2) 208.

which could be utilized by local administration for developing the socioeconomic infrastructure of the local population.³⁰⁴

However, the mitigation measures proposed by project proponent to provide additional ‘formal’ employment in mines and other allied activities or provision ‘skill development’ trainings for the community members does not address the infringement on the community’s right to derive their livelihood from common forest resources and holdings. It also does not address the long-term impact on the livelihood of the community members after the completion of mining activity as the occupational structure of the community as identified by the report itself, is largely comprised of unskilled and semi-skilled labourers who are dependent on agriculture and allied activities for a livelihood. The severance of land from the community also results a loss of the community’s traditional knowledge and resources.

Further, almost all speakers in the public hearings (in fact all speakers in Kalahandi hearings) voiced concerns that they are struggling for their basic needs, indicating the poor livelihood condition of the existing villagers (speaker no 1, 2, 3). Taking away their land which is their only present means of sustenance (and giving them wage work), would only push them further into poverty. In their initial response, the project proponent seems to suggest there will be no loss of livelihood, since “*no major tree cutting is involved except herbs, shrubs etc. and mining will be done as per the norms/Rules/Regulations.*” They also add that they will be undertaking skilling programs constantly for the villagers of impacted villages. The OSPCB authorities once again state that no evidence has been provided by the speakers for their claims. However, in their later response, they finally seem to recognize there will be a loss of livelihood, and then claim that there will still be a net benefit since the mineral value per year is higher than the annual agricultural income. They rely on their annual contribution of Rs. 2511.6 crore by way of mining revenue as royalty or to the District Mineral Fund etc. They also finally claim that the employment generation and provision of socio-economic services offsets the loss of livelihoods occasioned by the setting up of the mine. Pertinent to note that the funds collected under the DMF are channelled to State authorities, and not to the affected communities, thereby grossly skewing the distributional impacts of the mine.

³⁰⁴ Draft EIA Report (n 2) 208.

Project-related documents and the draft EIA report maintain a studied silence on the rights of affected communities to land, forests and autonomy, projecting an image not of rights-bearing citizens empowered by the law, but of an impoverished people denied of the fruits of development. If anything, the revenue generation at the mine, for both the project proponent and the state government, magnificently outweigh the benefits flowing to these affected communities, either on account of the structure of the DMF funds, or the loss of land and livelihoods without adequate measures to mitigate this loss of economic, cultural and political autonomy. Our research also demonstrates a startling violation of FPIC in the clearance processes of the proposed project so far, urgently necessitating scrutiny by the Governor, executive authorities responsible for clearance processes, CSOs and others.

Findings and Recommendations

The current project is proposed by M/S Vedanta Ltd. for the mining of 9 MTPA of bauxite for a mining lease period of 50 years, with the life period of the mine lasting 31 years. The method of mining in the project is open-cast mechanized mining. The mining process involves removal of top-soil and extraction of the bauxite ore through blasting. It also includes the setting up of two crushers of 1200 TPH capacity and 18 MTPA waste generation.

This report perused a wide diversity of sources to assess the environmental and human rights impact of the proposed project in the Rayagada and Kalahandi districts of Odisha, which are both Scheduled Areas under Fifth Schedule of the Constitution of India. This included both a description of the applicable rights and legal framework, as well as a scrutiny of project-related documents and secondary sources. Based on this analysis, the following are our key findings:

1. The legal framework governing mining projects and the proposed project, both violate land, autonomy, and cultural rights of *adivasis* and other forest-dwelling communities under domestic and international law

International and domestic law recognize the rights of *adivasis* and indigenous peoples to land, autonomy and culture through Conventions, Constitution, and various statutes. The right to land, autonomy and cultural rights is recognized under the UNDRIP, Constitution of India under Fifth and Sixth Schedule, FRA, PESA etc. The Fifth Schedule also prohibits alienation of land in Scheduled Areas from *adivasis* to *non-adivasis*. In Odisha, this is encoded in the Orissa Regulation of 1956, and in *Samatha*, the Supreme Court had included within the purview of this prohibition acquisition of land for state and private corporations. The LARR Act also states that land in Scheduled Areas will not be diverted for development projects, and this may be done only in exceptional circumstances provided there are no other alternatives.

However, both the legal framework as well as the current project cause large-scale violations of land, autonomy, and cultural rights. The MMDR, FCA, LARR do not adequately prevent state and non-state actors from exploring, proposing and/or setting up large infrastructural and extractive industries in Scheduled Areas. In fact, all these statutes delegate a high degree of quasi-legislative powers to the executive,

such that the statutes are mere framework legislations, where the entire process is effectively governed by Rules, Guidelines, Notifications, Circulars, policies etc. Such a high degree of delegation violates separation of powers and the right of indigenous peoples to be represented and participate in law-making that affects them.

Even under the clearance process, rightsholders and affected communities have very limited rights of participation, as they are excluded almost entirely from the MMDR process barring a requirement of consultation with *gram sabhas* at the stage of grant of mining lease. Otherwise, they enter the picture first at the stage of public hearings after the submission of the draft EIA report to obtain environmental clearance. This violates the right of STs and other traditional forest-dwellers under Section 5 FRA to take decisions pertaining to the use, protection and conservation of their community forest resources *prior* to the initiation of any activities on their customary lands.

The current project is located at Thuamul Rampur and Kashipur Tehsils in Kalahandi and Rayagada districts of Odisha, which are Fifth Schedule areas. The proposed project affects a population of 28,394 within 10 km radius, predominantly comprising SC (17.81%) and ST (64.17%) populations, who are majorly reliant on land and forest resources for their livelihood needs and cultural identities. Most of them are rightsholders under FRA, entitled to individual and collective rights to homestead, cultivable land, forest commons, minor forest produce, grazing lands, customary resources etc. At present, the rights settlement process is not yet complete, with a large percentage of households in both districts have still not claimed or received their final titles. Eviction and dispossession from forest rights before completion of the rights settlement process is prohibited under Section 4(5) FRA and an atrocity under the PoA Act. Indeed, the DLC of both Rayagada and Kalahandi have exceeded their statutory authority in issuing NOC for the purposes of forest diversion, as Section 6 FRA creates the authority for the purpose of approving record of rights prepared by the SDLC in the process of issuing forest rights titles.

Further, a mining project carries with it heavy infrastructural needs. The environmental clearance proposal states that the total area used will 1549.022 ha, as also mentioned in the draft EIA report, out of which 850.758 ha is non-forest land

and 699.654 ha is forest land. The project proposes a total use of 1204.57 ha land for the mine.

The proposal also envisages constructing heavy physical infrastructure at the mine site, which include extraction, crushers, internal roads for transportation, township for employees, office premises, gardens, temples, clinic area, and a resettlement colony, among others. However, the report does not go into detail of these infrastructure construction, except extraction and setting up of two crushers with 1200 TPH capacity.

Apart from a loss of land and forest rights directly occasioned by the setting up of the mine on their forest resources, this has a further domino effect of fragmenting customary resources, cultural identities, and undermining autonomy rights. The draft EIA report makes no mention of the impact on land, forest, and autonomy rights of affected communities.

One of the major findings from the draft EIA report has been the absence of the impact on the cultural and religious rights of the people. The draft EIA report has excluded the fact that the region of the proposed mine comes under the Fifth Schedule and has not addressed the cultural rights of the people as under the *Niyamgiri* judgment of the Supreme Court. Affected communities in public hearings and media have repeatedly reported the project site covers fifty of their sacred caves where they conduct ceremonies and rituals across various seasons.

2. The legal framework governing mining projects and the proposed project, both violate the right to free, prior, and informed consent of affected communities under domestic and international law.

The right to free, prior, and informed consent is recognized under both international and domestic law. However, clearance processes overall, particularly recent changes brought about to the forest and environmental clearance processes, grossly undermine this right. Under Section 5 FRA, the *gram sabha*, or, in Odisha the *palli sabha*, enjoys decision-making rights over the management and conservation of their community resources. Clearance processes do not bring information, representation, or participation of the *gram sabhas* until very late in the process, violating the requirement that consent must be *prior* to State action on their forest resources. Laws governing the EIA process provide for mere consultation with *gram sabha*. The Forest Conservation Rules 2023, like its

predecessor, also remove the requirement of *gram sabha* consent from Stage-I process, to be completed any time before issuance of certificate for forest clearance, which may even be after the Stage-II final approval has been obtained.

The current project, in particular, also witnessed severe violations of FPIC, as the two months preceding the public hearings witnessed heavy police action and criminalization of affected communities. This includes illegal detentions, midnight raids in villages, heavy police deployment and assaults on protesting assemblies. Almost two dozen men were arrested under various provisions of the IPC, while the police registered several open-ended FIRs bringing hundreds of unnamed persons into their fold. Such police action vitiates the environment in which the public hearings were conducted, affecting the free and informed participation of rightsholders in the proceedings.

Further, scrutiny of *gram sabha* resolutions of ten villages in Rayagada and Kalahandi pertaining to consent for the proposed project, held on 23 November 2023 and 8 December 2023, also suggest need for independent fact-finding and governmental action. Where even the official records of the public hearings under the EIA process signify that almost all speakers from affected communities objected to the project on environmental and rights grounds, the resolutions suggest that all members present and voting granted consent for the proposed project unanimously. In addition, *gram sabha* proceedings appear to have also been conducted in two uninhabited villages.

3. The proposed project will likely cause long-term irreversible and irreparable harm to forest and wildlife biodiversity and increase in human-animal conflict

The Conservation Management Plan notes that the main cause of loss of forest cover in Kalahandi and Rayagada over the past decade is mining. The loss of forest cover does not imply simply loss of trees, but of habitats for biodiverse ecosystems, as also long-term interruptions to the climate cycle. Forest ecosystems play an integral role in the maintenance of climate cycles, the long-term impact on which is unquantifiable and unmeasurable, and the draft EIA report does not even attempt to do this.

The core area of the mine mainly comprises vegetation/plantation (726 ha), open scrub forests (685 ha), agricultural land (119 ha), road (17 ha), settlement (2.01 ha),

and surface water bodies (0.01 ha). Around 1205 ha of this land will be excavated for extraction of ore. However, the draft EIA report surprisingly claims that “*no major tree cutting is involved except herbs, shrubs etc.*”

The EIA report mentions that there is no wildlife sanctuary, Biosphere Reserves, Tiger Reserves and Wildlife Corridors, Reserve & Protected Forest etc. within 10 km radius of the mining lease area. However, the Karlapat Wildlife Sanctuary is just beyond this boundary, at a distance of 12km and stands to be adversely affected by the mining project.

The draft EIA report mentions that around 0.18 million tonnes of topsoil will be generated annually, which results in depletion of vegetation and loss of fertility. The draft EIA report addresses the loss of fertility that will result from the loss of macronutrients in the mining area. However, the speakers at the public hearing highlighted that this fails to address the long-term loss of fertility that will result due to contamination of the area. This long-term loss of fertility also disables the ability of the forest to naturally re-generate over time.

There is a stark discrepancy between the effect on the floral and faunal diversity of the region, as stated in the draft EIA report and the speakers in the public hearing. According to the draft report, no endemic, endangered and rare species of flora were recorded in the study area. However, in the public hearings, speakers claim that the proposed mining activity will adversely affect around 73 types of trees, 21 types of grass, 32 types of Cheramuli, 20 types of Lata, and 25 types of medicinal plants.

Similarly, while the draft EIA report mentions certain species in different endangered and vulnerable category of the IUCN classification, as well as species that fall under Schedule I of the EIA Notification meriting highest level of protection, it states that no harm will ensue to them because of the mining process. However, speakers at public hearings have contested this claim.

The Conservation Management Plan tries to address this by setting up a Greenbelt plantation where more than 12 lakh trees will be planted. However, the plan confuses plantation with forest, and also fails to address whether this restoration plantation will be able to recover the loss in biodiversity. The Indian pangolin, an endangered species in the project area, is a burrowing animal, and excavating its natural habitat could further endanger its population.

The loss and fragmentation of wildlife habitats will further drive an increase in human-animal conflict. The project site is home to several endangered and vulnerable species, and is also proximate to the Karlapat Wildlife Sanctuary. Wildlife suffering a loss or fragmentation of their habitat on account of the mine will likely enter human settlements and habitations, leading to risk of crop and property destruction. This increase in human-animal conflict is unquantifiable, and the draft EIA report does not attempt to undertake this either.

4. The proposed project will likely lead to depletion and contamination of surface and ground water sources in the region

While the draft EIA report identifies certain impacts of the mining project in terms of water pollution, this mention is very limited as it, identifies only nine water bodies in the proximity of the mining site. In the public hearing, the speakers have mentioned that natural water bodies, amounting to around 20 water streams, exist at a distance of 0.4 to 8 km from the mine site.

Bauxite mining is a water-intensive operation. The project proposes to use 725 KLD of water while at full capacity. This water will be sourced by groundwater from a distance of 1 km and will be transported through the pipelines. However, in the Rayagada public hearing, speakers highlighted that the proposed mining project will use a large quantity of surface water for its activity which will result in water scarcity for local communities for drinking and agricultural purposes. While, initially the Project proponent did not specifically address this concern, in their later response they suggested that they will not use any surface water and only groundwater from borewells. However, villagers have claimed that the project will destroy their supply of water from Sijimali by destroying about 200 odd streams and their sources.

The proposal identifies certain materials, which are Hazardous (as per MSIHC rules) to human health or the environment (flora, fauna, and water supplies), to be used. The materials so identified are Ammonium Nitrate used at the rate of 58800 Tonnes/ Annum. However further remarks on prevention of pollution or safety measures or the storage facilities for these materials have not been mentioned in the Proposal.

5. The draft EIA report under-reports the probable forced displacement and loss of livelihoods in the affected villages

The draft EIA report mentions that the project will fall in eighteen villages in the Kalahandi and Rayagada districts of Odisha. Speakers at public hearings claim that the project would actually affect more than fifty villages. Both, the proposal and the draft EIA report estimate that only 100 families will be displaced by the project, with another 500 directly affected by it. This is belied by the population density of the eighteen villages covered by the mining site, where the draft EIA report suggests that there are 872 households in thirteen out of these eighteen villages. This does not account for the population of the remaining five villages, or the other thirty-two villages claimed in the public hearings. This also does not account for forced displacement in the medium and long-term as economic migration.

More than 70% STs in Odisha are engaged in agriculture or allied occupations, making them highly dependent on cultivable land, common forest resources, common pastures etc. for their livelihoods. The proposal claims that it will generate permanent employment for 277 persons and contractual employment for 97 persons. This secures wage work for only a small percentage of persons who will be displaced overall, without clarifying whether this employment will be for men or women.

6. The draft EIA report egregiously distorts the health impact of the proposed mine on affected communities and workers

Perhaps the most egregious finding in the draft EIA report pertains to the potential health impacts of the mine. The draft EIA report seeks to represent that the proposed project will have a positive impact on health of affected communities, as the Project proponent intends to set up Primary Health Centres (PHCs), invest in *Anganwadi* centres to generally improve sanitary conditions of villages etc. It completely disguises the short-, medium- and long-term impacts on the physical and mental health of affected communities. Bauxite mining generally is considered to lead to chronic respiratory issues, liver and spleen damage, exposure to communicable diseases like malaria and dengue etc. Consider that for transportation of the ore, the proposal states that there will be 300 trips per day to transport bauxite ore through dumpers, another 300 trips per day to transport top

soil and other waste through dumpers, and another 857 trips of tippers per day, generating significant air pollution, which cannot be adequately controlled through water sprinkling alone.

Contamination of food sources can have long-term impacts such as gastrointestinal problems. Miners, or workers at the mine, separately are at higher risk of disease due to proximate and continued exposure to toxic materials. The draft EIA report lacks a comprehensive identification and mitigation of physical, biological, and chemical hazards for workers, offering limited and insufficient safety measures.

This is in addition to the loss of traditional knowledge, health, and medical practices on account of loss of forest commons and medicinal herbs.

7. The central and state governments have unlawfully abdicated their obligations with respect to the right to health of affected communities

Domestic and international instruments cast the obligation for protection of right to health on the State. The inadequate health infrastructure in Kalahandi and Rayagada is a damning indictment of the failure of the State to guarantee adequate health facilities to its most vulnerable and marginalized populations. Instead of redressing this failure, the central and state governments are abdicating this obligation in favour of businesses and non-state actors, which is not permissible under domestic and international law. This is because health is a matter of rights, and not of corporate social responsibility. Businesses may aid in this, but the primary obligation remains with the State. Divesting this obligation to non-State parties such as businesses prevents participation of individuals and communities in having a say in the health infrastructure, eliminates mechanisms for accountability, while also constraining universal access on account of affordability and discrimination. Such a state of affairs foists an unfair and unlawful bargain on *adivasis* and other forest-dwellers to elect between the fulfilment of their land rights or socio-economic rights.

8. Certain state authorities are responsible for violating their obligations under the precautionary principle of environmental governance

Given the long-term irreparable, and irreversible harm, a lot of which is unquantifiable and is not even attempted to be assessed by the draft EIA report, the proposed project violates the precautionary principle and ought to be rejected.

In response to the objections raised by speakers at the public hearings, state officials dismiss these objections on the grounds that the people have not been able to substantiate their objections with adequate evidence. Consider the remarks of the Odisha State Pollution Control Board as noted in the official accounts of the public hearings that speakers have “failed to provide the source of information regarding the above Nallahs/streams.” The authorities, hence, have placed the burden of proof on the people, instead of the Project proponent. This violates the precautionary principle, which requires that the burden of proving the lack of harm lies on the Project proponent.

9. The Project proponent and its associates have violated their obligations under the UN Guiding Principles through their conduct before and during the clearance processes

Even businesses, as non-State actors, have human rights obligations under the UN Guiding Principles, which have been violated in the instant case. According to news reports, affiliates of the Project proponent such as M/S Mythri Infrastructure were complicit in the human rights violations of affected communities in the two months leading up to the public hearings.

Most strikingly, the project documents project the affected communities not as empowered rightsholders under the law, with the authority to shape their own destinies, but as the stereotype of impoverished and malnourished villagers, which similarly plagued the imagination of the British during the colonial period.

The draft EIA report has portrayed the image of the mining project as a developmental project which will bring progress to the region. The report has ignored how the mining project has the potential to worsen the developmental indicators of the region. The report ignores how land, as a natural resource, would be depleted and would therefore result in a large-scale forced displacement of the local communities impacting their health, livelihood, culture, and land rights among others. The process of obtaining clearances for the project has also been replete with rights violations of affected communities, particularly the right to autonomy and FPIC.

The draft EIA report fails to note the long-term, irreversible, and irreparable harm to the forest, wildlife and environment overall, and also grossly under-reports the livelihood and health impacts of the mine on the affected communities. While the Conservation Management Plan tries to address some of these damages, it does not adequately deal with it, as shown above. The precautionary principle, a fundamental tenet of environmental governance, emphasizes the need for caution in the face of uncertainty and potential harm. However, the report finds that the Sijimali Bauxite Mine Project has prioritized profit over precaution, neglecting to implement adequate measures to mitigate environmental risks or safeguard the rights of affected communities. Insufficient environmental impact assessments and a lack of meaningful consultation with indigenous groups further underscore the mine's disregard for the precautionary principle. Precautionary principles should be strictly observed and adhered to. The current project has already witnessed a slew of human, constitutional and fundamental rights violations at the pre-mine stage itself. This calls for serious and detailed scrutiny of the current project both by the state and the civil society actors.

10. The proposed project results in skewed distribution of costs on marginalized and ST and OTFD communities, and benefits to the project proponent and the State

The estimated cost of the project is Rs. 792 crores. While the project-related documents do not disclose the projected revenues from the project over its lifetime, the draft EIA report mentions that the project will contribute Rs.2511.58 crores per annum to the state and central government exchequer by way of royalties, contributions to DMF etc.

Sums collected under the District Mineral Fund and other Funds are vested in the governments instead of the affected communities, who will only be entitled to compensation for acquisition of their land and forest rights in the future, but will not participate in the royalties or profits from mineral extraction on their lands. In losing their customary land and forests, displaced and dispossessed households will be driven into wage work. The wage work generated at the mine will likely be unskilled low-wage work as the population struggles with low literacy rates. This will also be highly hazardous employment, with constant exposure to toxic wastes, air, and noise pollution.

This constitutes a violation of the right to development as affected communities lose the freedom to choose their own course of development. The State is also in violation of its obligations under the ICESCR to secure the progressive realization of socio-economic rights to housing, health etc., and to refrain from measures that regress the attainment of these rights for the most marginalized.

Accordingly, we make the following recommendations:

To the central and state governments:

- Uphold the right to land, autonomy, and self-governance of affected communities under the Fifth Schedule to the Constitution, FRA, PESA, and UNDRIP;
- Prohibit alienation of land from *adivasis* to non-*adivasis* in Scheduled Areas, including for development projects;
- Uphold the right to free, prior, and informed consent of affected communities under the FRA and UNDRIP;
- Immediately withdraw all pending criminal actions against individuals and community leaders of Rayagada and Kalahandi in relation to the project;
- Initiate criminal and disciplinary proceedings, where relevant, against State and non-State actors for illegal detentions and other human rights violations of the people of Thuamul-Rampur and Kashipur over the months of August and September 2023. This also includes violations of freedoms of speech, expression, and assembly of community leaders who are involved in organizing *gram sabha* meetings and bringing attention to violations.
- Abide by the precautionary principle throughout the clearance process for the proposed project, including casting the burden of proof on the project proponent and not the affected communities. Authorities should also accept community maps, prepared by *gram sabha* members, as adequate proof of their claims, as the same are acceptable for forest rights claims under the FRA.
- Rejecting the project on account of irreversible long-term harms to environment and human rights.

To civil society:

- Undertake independent and scientific environmental and social impact assessments of the proposed project through ground-truthing and fact-finding exercises.