



Legislation Brief

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) And Diversion Of Forests Under Forest Conservation Act 1980 (FCA)

**(Exploring the role of FRA within the processes
of Forest Diversion under FCA)**

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Tens of thousands of hectares of forest land is diverted for non-forestry purposes in India every year. For example, 15,639 hectares of land was diverted for 1,126 project proposals between 13-07-2011 and 12.07.2012¹. Legally such diversion of forest by state governments is regulated by the Forest Conservation Act (FCA) of 1980 which requires prior clearance by the Ministry of Environment and Forests (MoEF). The FCA was enacted to help in conservation of forests and to regulate de-reservation of forests. In 2006, The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act (hereafter referred to as Forest Rights Act or FRA), was enacted in order to set right the “historical injustice” committed towards traditional forest dwellers by recognising their rights and “strengthening the conservation regime of the forests while ensuring livelihood and food security”. Enforcement of the FRA has added another dimension to the forest diversion procedure, as the recognition and exercise of forest rights is impacted by diversion of forest land. Both the Acts operate through corresponding rules and guidelines. This legislation brief is an attempt to gain an understanding of the role of Forest Rights Act within the processes of forest diversion (as per Forest Conservation Act) through a simultaneous reading of the two Acts, and related guidelines, circulars and clarifications.

1 This information was given in the press release by MoEF in October 2012. In the 11th plan period MoEF has granted clearance for diversion of 2.04 lakh ha. of forest land.

1. How does Forest (Conservation) Act 1980 regulate diversion of forests for non-forest purposes?

The Forest (Conservation) Act (FCA), 1980, provides (in Section 2) that the State government cannot allow, without prior approval of the Central Government, any of the following activities:

- De-reservation of reserved forest land.
- Use of any forest land for non-forestry purpose.
- Assignment of forest land through lease or otherwise to any private person or any agency/corporation/organization which is not owned/managed/controlled by the government.
- Clearing of trees that have grown naturally in a forest land or portion of it, for the purpose of using it for reforestation.

In Section 3, the Act provides for a Committee (now referred to as Forest Advisory Committee or FAC) to be set up by the Central Government to advise the Government with regard to -

- The grant of approval under Section 2; and
- Any other matter connected with the conservation of forests which may be referred to it by the Central Government.

The functioning of the Committee is elaborated in the FCA rules.



2. What is the procedure under FCA for obtaining approval or clearance for a project needing forest diversion?

The FCA essentially requires State Governments and Union Territories to seek prior approval of the Central Government for use of forest land for non-forestry purposes. This procedure, commonly referred to as forest clearance, is as follows:

- The 'User Agency' (project developer/government department, etc.) which wants to use forest land for non-forestry purposes needs to submit its proposal in the appropriate form (appended to the Forest (Conservation) Rules, 2003) to the 'Nodal Officer' handling the FCA within the state government. Form 'A' has been provided for new proposals and Form 'B' for renewal of leases where approval had been obtained earlier. The User Agency needs to fill Part I of the above-mentioned forms wherein they need to provide various project details, including "justification for locating the project in forest area" and cost-benefit analyses.
- The State Government, after examining the proposal, needs to fill Part II to V of the concerned forms (A or B) and submit the proposal for diversion of forest land to the Central Government. Part II to V of the Forms has to be filled by the concerned Deputy Conservator of Forests, Conservator of Forests,

Nodal Officer (or Principal Chief Conservator of Forest (PCCF)) and the Secretary of the Forest Department respectively. These parts are related to scrutiny by the state forest department regarding the appropriateness or otherwise of the project from an ecological and socio-cultural perspective. The annexures to the proposal now also include the consent of Gram Sabhas to comply with FRA provisions as explained later on.

- Proposals up to 40 hectares (with a few exceptions) are to be sent by the State Government to the concerned Regional Office of the MoEF (while proposals above 40 hectares (with a few exceptions) are to be sent to MoEF in New Delhi). There are six regional offices in India (See Box: **Forest clearances from the regional offices of the MoEF**).

Forest clearances from the regional offices of the MoEF

Proposals for forest diversion involving forest land up to 40 hectares, other than those related to mining and encroachments are to be forwarded by the State Government or Union Territory administration to the Regional Offices of the MoEF. These regional offices are based in Chandigarh, Lucknow, Shillong, Bhubaneswar, Bhopal, and Bangalore.

The states which come under the purview of each Regional Office are as follows:



1. Chandigarh (Northern Region): Jammu & Kashmir, Punjab, Haryana, Himachal Pradesh, Chandigarh and Delhi.
2. Lucknow (Central Region): Uttar Pradesh, Uttarakhand and Rajasthan.
3. Shillong (Northeastern Region): Arunachal Pradesh, Assam, Manipur, Meghalaya, Tripura, Nagaland, Mizoram and Sikkim.
4. Bhubaneswar (Eastern Region): Jharkhand, Orissa, West Bengal, Bihar and Andaman & Nicobar Islands.
5. Bangalore (Southern region): Andhra Pradesh, Goa, Karnataka, Tamil Nadu, Kerala, Pondicherry and Lakshadweep.
6. Bhopal (Western Region): Madhya Pradesh, Chhattisgarh, Maharashtra, Gujarat, Dadra & Nagar Haveli, and Daman & Diu.

The Regional Office of the MoEF has to take a final decision for diversion proposals up-to 5 hectares. For proposals from 5 – 40 hectares the regional office has to process, scrutinize and forward diversion proposals with their recommendations for final decision of the Central Government in MoEF New Delhi.

A Regional Empowered Committee (REC) has to be set-up at each of the Regional Offices to decide on proposals up to 40 hectares. This will perform a role similar to the FAC at the Central level. However, such RECs are yet to be made functional across the country.

Proposals above 40 hectares (as also all proposals related to mining and encroachment) have to be forwarded to the MoEF headquarters in New Delhi by state governments. Depending on the specific case, in most such projects the MoEF Regional Office will still carry out site inspection and conduct post-clearance monitoring.

- All proposals sent to MoEF are to be examined by the Forest Advisory Committee which will give its advice or opinion. The MoEF will then grant approval or otherwise. As per the FCA Guidelines and Clarifications, the approval is given in two stages: in-principle approval (Stage – I) and final approval (Stage – II). During Stage – I approval, the proposal will be given in-principle approval subject to compliance with certain conditions. After compliance with conditions of Stage – I approval, the proposal will be given final approval
- Pursuant to the issue of final (Stage – II) approval by the Central Government, the State Government is supposed to issue an order



diverting the forest land for non-forestry purposes in favour of the User Agency.

3. What were the pre-existing provisions for involvement of local people in giving clearances for forest diversion prior to the Forest Rights Act?

There seems to be little space for local participation in the original act of 1980. As per a circular issued by MoEF on 26-02-1999², it was observed that a large number of representations from NGOs and local bodies were being received against such diversion on grounds of loss of forest land, and for environmental and ecological reasons. The circular then stated "Therefore, the Central Government feels that it is essential to have the opinion of local people whenever a project is coming up in that area. Therefore, it has been decided that whenever a proposal for diversion of forest land is submitted, it should be accompanied by a resolution of the 'Aam Sabha' of Gram Panchayat/ local body of the area endorsing the proposal that the project is in the interest of people living in and around the proposed forest land. " This provision, at least in theory, provides some amount of space for local participation in the project clearance process.

2 Circular dated 26-02-1999 titled 'Scrutiny of proposals submitted for diversion of forest land for non-forest purposes under the Forest Conservation Act, 1980'.

However, a subsequent circular by MoEF on 17 August 2000 diluted such a requirement by clarifying that for projects requiring public hearing (which will include many projects that additionally require environmental clearance), and a number of other kinds of projects, such consent is not needed. This move has been criticized because the processes of public hearing and that of the aam sabha consent are two very different processes in terms of scope of participation and specificity of discussions. Hence organization of a public hearing should not be considered as a sufficient reason to remove conditions of Aam Sabha consent. Some believe that this provision has been, for all practical purposes, non-functional and no such consent has been sought in a majority of cases.

4. What are the relevant provisions of the Forest Rights Act 2006 vis-à-vis the Forest Conservation Act 1980?

Any process of forest diversion will have a serious impact on a number of social, economic and bio-cultural practices of the communities residing in and around such forests.

As mentioned above, the Forest Rights Act or FRA came into force to undo historic injustice to forest-dwelling communities by recognizing and vesting the rights to use, manage and conserve forest resources and to legally hold forest lands that they have been residing in and cultivating. The Act provides for the rights to be vested in individual claimants within a community



or in the community as a whole. Apart from rights to residence and cultivation (<http://tribal.gov.in/writereaddata/mainlinkFile/File1033.pdf>), the Act provides for the right to collect, use and dispose of traditionally collected minor forest produce; fish and other products of water bodies; grazing rights; access to biodiversity, intellectual property rights and rights to traditional knowledge; and the right to protect, regenerate, conserve or manage community forest resource.

The FRA has provided for legal establishment of the above rights which would make it legally mandatory for the local economic and livelihood issues to be considered in any process of forest diversion.

The most important of these rights, however, is the right to delineate and claim for protection, conservation and management the "Community Forest Resource", which is defined in the Act as "customary common forest land within the traditional and customary boundaries of the village or seasonal use of landscape in the case of pastoral communities, including reserved forests, protected forests and protected areas such as sanctuaries and national parks to which the community had traditional access". In addition, Section 5 of the Act and Rule 4e (See Box: **Provisions in the FRA for protection and conservation of forest resources**), empowers gram sabhas, right holders and other village level institutions to protect forest, wildlife and biodiversity and to preserve

natural and cultural heritage from destructive activities.

Together, these two provisions create significant democratic space for those who are likely to be most impacted by forest diversion. Additionally, these provisions go beyond the conventional paradigm of "calculating" the impact on "livelihoods" and "compensating" for the same, by also providing for dissent and rejection, if the community felt that their "natural and cultural heritage" is being impacted.

Provisions in the FRA for protection and conservation of forest resources

The Act defines community forest resource (Section 2(a)) as "customary common forest land within the traditional or customary boundaries of the village or seasonal use of landscape in case of pastoral communities, including reserved forests, protected forests and protected areas such as Sanctuaries and National Parks to which the community had traditional access." Section 3(1)(i) provides "the right to protect, regenerate, or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use".

Section 5 of FRA empowers the holders of forest rights, gram sabhas and village level institutions to "(a) protect the wildlife, forests and biodiversity;



- (b) ensure that adjoining catchment areas, water sources and other ecologically sensitive areas are adequately protected;
- (c) ensure that the habitat of forest dwelling Scheduled Tribes and other traditional forest dwellers is preserved from any form of destructive practices affecting their cultural and natural heritage;
- (d) ensure that the decisions taken in the Gram Sabha to regulate access to community forest resources and stop any activity which adversely affects the wild animals, forest and the biodiversity are complied with.”

Elaborating on the constitution, goals and objectives of the Gram Sabha, Rule 4(1)e states “the Gram Sabha shall constitute committees for the protection of wildlife, forest and biodiversity, from amongst its members, in order to carry out the provisions of section 5 of the Act.”

The 2012 amendment rules of the FRA, Section 12(1)g state: **“The delineation of community forest resource may include existing legal boundaries such as reserve forest, protected forest, National Parks and Sanctuaries and such delineation shall formalize and recognize the powers of the community in access, conservation and sustainable use of such community forest resources (emphasis added).”**

5. In what kind of situations will the FRA have an implication for the process of forest diversion?

As the FRA doesn't directly mention how it will influence the process of forest diversion, there is a degree of subjectivity in interpretation. An interpretation can be derived from a simultaneous reading of the preamble of FRA, the provisions of the Act, and various circulars issued subsequently. The FRA-FCA interface becomes important wherever a project will affect rights of forest dwellers eligible for recognition under FRA or lead to their eviction. This is true even where the process of rights recognition has not yet begun for a given state. Therefore, the Act will have an implication on the process of forest diversion in the following types of situations, where the project activities and proposed diversion:

- a. affects forest dwellers who are eligible for rights recognition under the Act,
- b. affects conservation, protection, management or regeneration of community forest resource, and
- c. may lead to removal of a forest dweller from their place of residence.

It must be noted that even in areas where there may be no eligible right-holders, the state government will have to enclose supporting evidence while submitting proposals for forest diversion to substantiate the above (see Question 7).



Each of the above points is elaborated below:

- a) *Situations where the project activities and proposed diversion affects conservation, protection, management or regeneration of community forest resource*

Community Forest Resource refers to traditionally accessed common forest land. Under Section 3(1) (i) of the FRA, forest dwellers have a right to protect, manage, conserve and regenerate their community forest resource. This right, along with empowerment provided in Section 5 would imply that Gram Sabha can stop an activity of forest diversion where it has reasons to believe that the project requiring forest diversion includes activities that are destructive towards “cultural and natural heritage” or “adversely affect the wild animals, forest and the biodiversity” or threaten the “adjoining catchment areas, water sources and other ecologically sensitive areas”. As forest diversion activities can pose such potential threats to conservation of forest commons, it will be important to look at the FRA-FCA interface in such cases.

- b) *Situations where the project activities and proposed diversion affect any forest right that is eligible to be recognised by the Act:*

Section 5 empowers forest dwellers to protect their “natural and cultural heritage” and to ensure compliance to Gram Sabha decisions which “regulate access to community forest resources and stop any activity which adversely

affects the wild animals, forest and the biodiversity”. Most, if not all, forest rights listed in Section 3(1) are components of the “natural and cultural heritage” and are also linked to access to the community forest resource. This should imply that where any of these rights (such as rights to grazing or collection of NTFP or the right to access and worship in traditional sacred places within the forest) are directly or indirectly affected, the forest diversion procedure will need to give due consideration to the affected gram sabhas and to recognize their powers of decision making. It should also be noted that this will apply over the entire impact area of a project, and on rights directly and indirectly affected by forest diversion process including compensatory measures.

- c) *Situations where the project may lead to removal of a forest dweller from occupied land*

As per the Section 4(5) of the Act, save as otherwise provided, no member shall be evicted or removed from forest land under his occupation till the recognition and verification process is complete. The Ministry of Tribal Affairs (MoTA) guidelines of 12 July 2012 on FRA also reiterate specifically in context of forest diversion that “Section 4(5) of the Act is very specific and provides that no member of a forest dwelling Scheduled Tribe or other traditional forest dwellers shall be evicted or removed from the forest land under his occupation till the recognition and verification procedure is



complete. This clause is of an absolute nature and excludes all possibilities of eviction of forest dwelling Scheduled Tribes or other traditional forest dwellers without settlement of their forest rights as this Section opens with the words "Save as otherwise provided". The rationale behind this protective clause against eviction is to ensure that in no case a forest dweller should be evicted without recognition of his rights as the same entitles him to a due compensation in case of eventuality of displacement in cases, where even after recognition of rights, a forest area is to be declared as inviolate for wildlife conservation or diverted for any other purpose. In any case, Section 4(1) has the effect of recognizing and vesting forest rights in eligible forest dwellers. Therefore, no eviction should take place till the process of recognition and vesting of forest rights under the Act is complete. "

The project-affected villages need to include villages where forest rights and land are impacted by the diversion directly or indirectly (See Box: **Project impact area may extend beyond project site**)

Project impact area may extend beyond project site

Forest rights are impacted over a much larger landscape than the area of forest land that is stated in diversion proposals. The environmental and social impacts of a particular project for which

diversion of forest land is sought are not necessarily restricted only to the forest land being directly acquired for the project. Consequently, forest rights too are impacted over a larger landscape, a fact ignored in the current process for diversion of forest land. The large hydropower projects coming up in the state of Arunachal Pradesh are of this kind. Their impacts on forest rights of local communities go far beyond the forest land being directly acquired.

Shifting agriculture (jhum) is a dominant feature of traditional land use in the hills of Northeast India and plays a critical role in the livelihoods of people, maintaining agricultural biodiversity and providing food security. Increasing pressures on land have resulted in the shortening of jhum cycles (the length of the fallow period between two cropping phases) in recent times, thus impacting forest regeneration and connected ecological viability (and sustainability) of this farming system. The submergence of land by hydel projects will further shorten the jhum cycle and increase the pressure on the surrounding forest areas, thus affecting the environment and the livelihoods (including rights of forest dependent communities over a much larger landscape. Such livelihoods and rights will also be impacted in downstream riverine tracts, which



form part of forest land in many situations (e.g. riverine tracts of the Lohit river downstream of the 1750 MW Demwe Lower project), due to drastic alteration in natural water flow patterns which adversely impact riverine ecology. Further, land use restrictions (with implications on forest rights) for local communities will apply in the Catchment Area of the reservoir as per mandatory norms, to reduce siltation and to increase the life of the reservoir. Such forest land and associated rights being impacted are not being examined as part of the diversion proposal, even though there is a clear impact on ecology and forest rights. This will also have a significant bearing on the Cost-Benefit Analysis of a project (part of the forest clearance process), which needs to take into account the environmental and social impacts of a project due to impact on forest land.

In addition, compensatory mechanisms required as per forest laws to offset the loss of forests due to the project (e.g. Compensatory Afforestation), lead to other areas used by the communities being brought under increased control of the forest department by declaring them as Reserved/Protected Forests. This results in a change of legal tenure and a potential threat to existing community land-use and access to resources(for example,

the conversion of Unclassified State Forests in Arunachal Pradesh, with greater access currently available to communities, into Reserved or Protected Forests, with greater state control). The impacts on rights of local communities in such cases have not been examined in terms of the FRA. (See Box: **Effect of Compensatory afforestation measure on forest rights**).

Effect of Compensatory afforestation measure on forest rights

As stated in the August 2009 circular, consent is required not only from the Gram Sabhas in whose jurisdiction the land being diverted is located, but also those in whose jurisdiction the “compensatory and ameliorative measures” for the project are located. In fact the spirit of the circulars is such that consent from all Gram Sabhas where forest land is impacted by project (whether by direct diversion or otherwise) is required. However, in practice, the impacts on rights of local communities in areas where compensatory afforestation takes place have not been examined in terms of rights recognized under FRA.

Although this issue has been completely ignored as part of the forest clearance process, it must be noted that some of these issues have at least on one occasion been acknowledged as part of the



environmental clearance process under the EIA notification, 2006. The MoEF, in the case of the 2700 MW Lower Siang hydroelectric project in Arunachal Pradesh, prescribed the inclusion of the following in the **Terms of Reference** for Environment Impact Assessment: "Impacts of Catchment Area Treatment (CAT) and Compensatory Afforestation (CA) on existing resource use and rights of local communities, particularly in light of determination of rights under the Scheduled Tribes and other forest dwellers (Recognition of Forest Rights) Act, 2006." However to the best of our knowledge this is the only project where this has been prescribed.

6. How will applicability of FRA, especially CFRs, relate to eminent domain powers of the State?³

The eminent domain (See Box: **Eminent domain powers of the government to seize private property**) powers of the state allow for the extinguishment or take-over of any rights that have been granted by it in the first place. Even in an instance where land ownership is transferred to a village or panchayat and it is attributed to be their common property, such land can be acquired using the state's eminent domain powers. However, unlike the pre-rights

3 The response to this has been taken from Kohli, K, Kothari, A. and Pillai, P. *Countering Coal? Community Forest Rights and Coal Mining Regions of India*. 2012. Kalpavriksh, Delhi/Pune and Greenpeace India, Bengaluru.

scenario, with CFR rights, communities are empowered with the potential of collective assertion to either resist this take-over or be able to negotiate a better compensation. One interpretation is that eminent domain powers of the state could be resisted if one combines the fact that the CFRs being granted are non-alienable and non-transferable, along with the empowerment of communities to conserve forests and traditional knowledge (both provided for in the FRA). But this of course would be subject to varied interpretations in and outside the courts. Therefore it is not that FRA or its provision of CFRs can be used as an absolute guarantee against acquisition or diversion of land. It does however add another layer of decision-making where communities have a central role to play in both filing community claims and at a later date deciding whether the rights being threatened are worth the fight or not. It cannot be denied that the CFR process takes one aspect of the decision making to the level of the people who would be most affected by change of land use. But there are a range of social, economic, political factors that influence the final decision either at the level of the community or by the state, of which CFRs would be only one.

Eminent domain powers of the government to seize private property

Article 19(1)(f) of the Indian Constitution, as originally enacted, provided that all citizens have the right to acquire, hold and dispose



of property. Article 31 in turn stated that "No person shall be deprived of his property save by authority of law." It also provided that compensation would be paid to a person whose property had been "taken possession of or acquired" for public purposes. Both Articles were included in the fundamental rights section and both were eventually deleted. In their place was added Article 300A which reads ambiguously that "No person shall be deprived of his property save by the authority of the law." This formulation of constitutional property rights leaves the door open for statutory law, enabling state seizure of land. This also leaves the door wide open for misuse.

Forest Rights and Eminent Domain: the Vedanta case

It need not however always happen that the power of eminent domain will be used by the government to seize land from local communities for handing over to private interests. This can be seen in the context of the affidavit filed by the Ministry of Environment and Forests and the subsequent April 18, 2013 Supreme Court ruling.

According to the MoEF the cancellation of the environmental clearance granted to Vedanta for the Lanjigarh Bauxite mining project in Odisha, was justified because forest land cannot be diverted under the provisions of the Scheduled

Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. In the affidavit filed in the Supreme Court, the MoEF said: "The diversion of forest land on the proposed mining site of the Lanjigarh bauxite mining lease is violative of the fundamental rights of the Dongria Kondh tribals as well as the spirit of Forest Rights Act especially for the vulnerable tribal groups such as the Dongria Kondh and thus cannot be allowed for this reason alone. ...Diversion of these sacred areas for mining will undermine the customary rights of the Dongria Kondhs to protect their sacred places of worship and thereby amount to a violation of their fundamental right to manage their own affairs in the matter of religion and fundamental right to conserve the culture of their own. It was also in direct violation further of the specific provisions of the Forest Rights Act."

The affidavit specified that where such diversion is unavoidable, eminent domain powers can be used to divert forest land over which rights have been recognised or are likely to be recognised. It further specified that for such acquisition, the following conditions need to be satisfied:

- (a) Process of recognition and vesting of rights is complete,
- (b) Resettlement/ alternatives package has been prepared,



communicated and accepted, and

- (c) Diversion for public facilities (provided as a right under Section 3(2) of FRA) has been consented to and completed.

Additionally, where the diversion affects quality of life of right-holders or hampers their performance of duties under Section 5, free informed written gram sabha consent to the resettlement needs to be obtained. Also that diversion should ordinarily not be allowed where rights of primitive tribal groups and pre-agricultural communities are concerned, even if the first two points are followed.

On April 18, 2013 the Supreme Court ruled that "Religious freedom guaranteed to scheduled tribes and the forest dwellers under Articles 25 and 26 of the Constitution is intended to be a guide to a community of life and social demands. The above mentioned Articles guarantee them the right to practice and propagate not only matters of faith or belief, but all those rituals and observations which are regarded as integral part of their religion. Their right to worship the deity Niyam-Raja has, therefore, to be protected and preserved." It also ordered that the village councils in Odisha's Rayagada and Kalahandi districts would decide whether their right to worship is violated by

projects of mining and metals giant Vedanta.

Thus the apex court upheld two major rights: the constitutional right of tribal groups to their own way of life and the right of the community through village councils to decide on affairs that may negatively impact their lives.

7. In cases where one (or more) of the three situations specified above for FRA applicability are valid, what will be its implications on the process of forest diversion?

Of major significance in this case is the MoEF circular of 3rd August 2009 (See Box: **MoEF Circular on FRA Compliance dated 3-08-2009**). The July 2012 Guidelines on FRA issued by MoTA have also reiterated that "The State Government should ensure that all diversions of forest land for non-forest purposes under the Forest (Conservation) Act, 1980 take place in compliance with the instructions contained in the Ministry of Environment & Forest's letter dated 30.07.2009, as modified on 03.08.2009". It should here be noted that the 3.8.2009 circular has recently been modified (on 05.2.2013), lifting the requirement of public hearing and Gram Sabha resolution in case of linear diversions such as laying of pipeline, construction of roads and canals, etc. except where recognized rights of Primitive Tribal Groups or



Pre-agricultural Communities are affected (See Box: **Depleting spaces for socio-environmental justice in forest governance**).

Depleting spaces for socio-environmental justice in forest governance

The MoEF Circular on FRA compliance dated 3-08-2009 regarding diversion of forest for non-forest purpose, a move that could have potentially saved India's forests, has come to nought as a result of the setting up by the center of a Cabinet Committee on Investment (CCI). This new initiative of the finance ministry set up to hasten environmental and forest clearances for projects, may render the environment minister completely powerless, and the environment ministry superfluous. The minister for environment had written to the Prime Minister (PM), expressing her "very serious concern" at the setting up of a CCI to provide fast-track clearances for major infrastructure projects, saying the "concept is unacceptable.

On the other hand, Mr. K. C. Deo who is in charge of the MoTA had, through a very strong letter, put the Ministry of Environment and Forest (MoEF) itself in the cross-wire of criticism, by objecting to the practice of illegally diverting forest land for projects in violation of the Forest Rights Act (FRA) -

thus pointing to the MoEF's own culpability. His letter argues that: (1) Steps described in the 2009 order to be followed before granting Stage 1 clearance, (2) MoTA should be represented on the FAC, and, (3) Gram Sabha meetings discussing such diversion to be videotaped. In another letter dated 7 December 2012, the MoTA minister again raised concern that MoEF's order dated 3.8.2009 to ensure that diversion of land under Forest (Conservation) Act 1980 "appears to be honoured in breach".

In a further development, a committee headed by the Prime Minister's principal secretary Pulok Chatterjee, and including the secretaries in MoEF and MoTA as members, has been engaged in an attempt to push MoTA and MoEF to bypass the Forest Rights Act for most projects. The committee report has said that in cases where public consultations have occurred for other clearances, the consent of gram sabha should be done away with. This would make the affected tribal groups consent irrelevant in most cases. In the case of linear projects, the PMO has said that just a certificate from the state government stating that processes under FRA have been completed would be adequate. The recommendations of the committee were severely criticized by many national and international groups working on the issues of



conservation, livelihoods and human rights. Their arguments were based on concerns related to both environmental and social justice since it was felt that neither can the two processes of public hearing and Gram Sabha be equated, nor the requirement of completing rights recognition be achieved by a mere statement from the State government.

As a final consequence of the whole debate, MoEF has issued a new circular on 5 February 2013 stating that the requirement of public hearing and Gram Sabha resolution may be lifted in case of linear diversions such as laying of pipeline, construction of roads and canals, etc. except where recognized rights of Primitive Tribal Groups (Particularly vulnerable Tribal Groups) or Pre-agricultural Communities are affected.

Based on these and some other clarifications, as well as the provisions within the two acts, the following procedures need to be completed in projects involving forest diversion for compliance with FRA. These procedures need to be completed before grant of stage 1 approval itself, rather than at Stage 2 of the process, and this has been clarified in the FAC minutes of meeting of 2-4-2012 and in the letter written by MoTA minister to MoEF minister on 19-11-2012.

a) *Prior recognition of rights of forest dwellers over the area proposed for diversion*

- The August 2009 circular gives a list of documents required to be enclosed, many of which pertain to establishing that all procedures of rights recognition under FRA have been completed in that area (Box 3).
- In cases where there has been no initiation of the FRA process at state level, state government needs to enclose evidence supporting that settlement of rights will be done before the final approval.
- The July 2012 guidelines also reiterated that 'in no case a forest dweller should be evicted without recognition of his rights as the same entitles him to a due compensation in case of eventuality of displacement in cases, where even after recognition of rights, a forest area is to be declared as inviolate for wildlife conservation or diverted for any other purpose'.

MoEF Circular on FRA Compliance dated 3-08-2009

"Subject: 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 Rights Act), 2006.

Accordingly, to formulate unconditional proposals under the Forest (Conservation) Act, 1980, the State/ UT Governments are, wherever the process of



settlement of Rights under the FRA has been completed or currently under process, required to enclose evidences for having initiated and completed the above process, especially among other sections, Section 3(1), 3(1)e and 4(5). These enclosures of evidence shall be in the form of following:

- a) A letter from the State Government certifying that the complete process for identification and settlement of rights under the FRA has been carried out for the entire forest area proposed for diversion, with a record of all consultations and meetings held;
- b) A letter from the State Government certifying that proposals for such diversion (with full details of the project and its implications, in vernacular /local languages) have been placed before each concerned Gram Sabha of forest-dwellers, who are eligible under the FRA;
- c) A letter from each of the concerned Gram Sabhas, indicating that all formalities/ processes under the FRA have been carried out, and that they have given their consent to the proposed diversion and the compensatory and ameliorative

measures if any, having understood the purposes and details of proposed diversion.

- d) A letter from the State Government certifying that the diversion of forest land for facilities managed by the Government as required under section 3(2) of the FRA have been completed and that the Gram Sabhas have consented to it.
- e) A letter from the State Government certifying that discussions and decisions on such proposals had taken place only when there was a quorum of minimum 50% of members of the Gram Sabha present;
- 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 Primitive Tribal Groups and Pre-Agricultural Communities, where applicable, have been specifically safeguarded as per section 3(1) (e) of the FRA.
- h) Any other aspect having bearing on operationalization of the FRA. The State/UT Governments, where process of settlement of Rights under the FRA is yet to begin, are required to

enclose evidences supporting that settlement of rights under FRA 2006 will be initiated and completed before the final approval for proposals.”

b) Providing affected Gram Sabhas with full details of project proposal in local languages

The Gram Sabhas of all concerned villages need to be provided with full details of the project in an accessible form, to be able to understand the details of the project and its implications. Point b and c of August 2009 circular seem to indicate this:

- i) State government needs to certify that proposals “with full details of the project and its implications, in vernacular /local languages” have been furnished for consideration before all concerned Gram Sabhas;
 - ii) Each concerned Gram Sabha needs to give in writing that their consent to the diversion and the compensatory and ameliorative measures is after “having understood the purposes and details of proposed diversion.”
- c) Recording the proceedings of the gram sabha meetings*

The following indicate a need for recording proceedings of gram sabha meetings in which the proposed

project for diversion of forest land was discussed:

- i) The August 2009 circular states that the letter from the State Government certifying that identification and settlement of rights under FRA have been carried out, should be accompanied “with a record of all consultations and meetings held.”
 - ii) The letter issued by MoTA minister to Chief Ministers on 24 May 2012 recommends that “Gram Sabha meeting for the Forest Rights Act and especially for critical decisions such as diversion of forest land should be videotaped and videos made publicly accessible. This will ensure transparency and reduce manipulation and disputes.”
 - iii) A subsequent letter by MoTA minister to MoEF minister dated 19 November 2012 on the issue of FRA compliance in forest diversion urges MoEF to make video-graphing of such Gram Sabha meetings a requirement.
- d) Written consent from gram sabha of all affected villages to the diversion and compensatory and ameliorative measures*

As per the August 2009 circular the following documents are required as evidence of gram sabha consent



(where more than 50% members were present) not only for diversion but also the compensatory and ameliorative measures:

- i) "A letter from each of the concerned Gram Sabhas, indicating that all formalities/ processes under the FRA have been carried out, and that they have given their consent to the proposed diversion and the compensatory and ameliorative measures if any, having understood the purposes and details of proposed diversion."
- ii) "A letter from the State Government certifying that discussions and decisions on such proposals had taken place only when there was a quorum of minimum 50% of members of the Gram Sabha present. "
- iii) "Obtaining the written consent or rejection of the Gram Sabha to the proposal."

e) Additional considerations in Cost benefit analysis

As per FCA, a cost-benefit analysis is required for all proposals involving forest land extending over more than 20 ha. in the plains and more than 5 ha. in the hills, including roads, transmission lines, minor, medium and major irrigation projects, hydel projects, mining activity, railway lines, location-specific installations like micro-wave stations, auto repeater

centers, T.V. towers, etc. The objective of cost-benefit analysis is⁴ "to determine whether diverting the forest land to non forest use is in the overall public interests." Since the enactment of the FRA, forest dwellers became eligible for recognition of a wider set of use, access, management and socio-cultural rights. The overall cost-benefit analysis therefore will have to give due consideration to all such rights being affected.

8. What is the status of compliance of above mentioned circulars and clarifications?

Although FRA came to force on 31 December 2007 and the circular on FRA compliance was issued in August 2009, the first substantive mention of the issue was only in the meeting of Forest Advisory Committee (FAC⁵) on 2 April 2012. The FAC, in that meeting (as an Additional Agenda Item), took cognizance of the August 2009 circular and the fact that it was in general not being followed, urged for its compliance and stated that:"No project proposal will be considered complete until these documents are submitted as required under rules and circulars under the terms of the aforesaid enactment of

4 Handbook of Forest (Conservation) Act, 1980, Annexure vi (a).
 5 As mentioned in question 2 on procedures, all proposals sent to MoEF are to be examined by the Forest Advisory Committee which will give its advice or opinion.



2006. These documents are to be given in complete and full form at Stage-1 of the process of consideration and clearance and need to be in accordance with the said circular in all respects. State Governments may be advised to take cognizance of this circular and ensure compliance in all respects to ensure the protection of the rights of the Scheduled Tribes, of the Traditional Forest Dwellers, and especially so, of the Primitive Tribal Groups. The Gram Sabha resolutions complete in every respect are required for those who depend upon or are resident in a forest area. The FAC was unanimous that the circular dated 3 August 2009 leaves no scope for ambiguity. ”

In the same meeting, the FAC recommended that the State Government should submit “Documentary evidence pertaining to recognition of rights in accordance with the provisions of the Scheduled Tribes and Other Traditional Forest dwellers (Recognition of rights) Act 2006 as stipulated by this Ministry vide their letter no. 11-9/1998-FC (pt.) dated 03.08.2009 in respect of the forest land proposed for diversion” for two of the project proposals being considered (a double circuit transmission line in Manipur and an open cast coal mining proposal in Madhya Pradesh).

Following that, there was no mention of FRA recorded in the minutes of subsequent FAC meetings till the 27 November 2012 meeting where the FAC

recorded requirement of information regarding settlement of rights under FRA for many of the projects under consideration. However, in the immediately succeeding meeting on 22 December 2012, the FAC has recommended clearance for two mining projects in Odisha (Agenda Item 12 and 13) even after admitting that no rights recognition under the FRA, as required, had taken place in either. For these two diversions, the FAC has ordered eviction of all encroachers which in itself is a violation of the FRA as it is legally incorrect to term any forest dweller as encroacher when the process of recognition of rights under the FRA is not complete. It leaves the decision of whom to evict completely open to interpretation and possible misconstruction.

At the 22 January 2013 FAC meeting, forest diversion for Luhri hydroelectric power project in Himachal Pradesh was recommended despite admitted non-compliance to the 2009 circular and in absence of rights recognition under FRA in the area. The move has been criticized by various conservation and human rights NGOs. The decision, as justified in the minutes, is based on MoEF’s letter dated September 20, 2012 to Principal Secretary (Forests) of Himachal Pradesh. According to this letter a certificate from the District Commissioner stating that there has been settlement of rights is sufficient. This is in consideration of the specific situation “where according to



the Hon'ble Chief minister, rights and concessions on forest land throughout the State including the tribal areas have been settled long back and recorded in settlement reports, and that no FRA compliance issues exist which need to be settled. ”

9. What are the options that can be exercised by affected forest dwellers for raising the issue of FRA violations in forest diversion?

Given below are a few options⁶ that can be used by affected forest dwellers for raising issues of non-compliance to FRA in forest diversion.

1. Gram Sabha resolutions to State Level Monitoring Committee

Wherever there are eligible right holders, the gram sabha is legally empowered to take action (as per Section 7 and 8 of FRA) in case forest diversion impacting their rights is taking place without following the prescribed procedures. If any authority or officer contravenes the provisions of FRA, it is deemed as an offence under Section 7 and the Gram Sabha can pass a resolution seeking action from the State Level Monitoring Committee against the offender. While passing such resolutions

6 This section is based on the site maintained by Campaign for Survival and Dignity (CSD). It has been excerpted from CSD's policy brief instructions entitled **Note: Using the Forest Rights Act Against Displacement and Large Projects** and is available at <http://www.forestrightsact.com/resources-for-activists/item/18>

legal procedural requirements that need to be kept in mind are:

- The gram sabha meeting should have a quorum of 66%.
- The meeting should be held at the level at which Forest Rights Committees were formed by the Government.
- The resolution and signatures should be recorded in the register maintained for such meetings. Additionally, where possible, a video-recording of the meeting should be made.
- The notice for the gram sabha meeting should be issued in advance, following applicable legal provisions.

The resolution needs to :

- Briefly describe the community and its forest dependence,
- Explain how the diversion may affect their rights, their natural and cultural heritage and responsibilities of conserving the community forest resource,
- State the violations of procedures and the gram sabha's particular objections which amount to a criminal offence under Section 7. For e.g. was the gram sabha consent obtained? Were all details of the project furnished and consultations held? Was the rights recognition procedure completed? Had the villagers given consent to the diversion and to relocation?



The Court can be moved if there is no response or action from SLMC within 60 days.

2. *Bringing violations to the notice of MoEF or MoTA*

MoEF and MoTA are the nodal agencies for FCA and FRA respectively. The recent pro-active role of MoTA in highlighting the issue of FRA violations in forest diversion to MoEF, chief ministers and certain states through letters such as the one dated 24 May 2012⁷ and the guidelines issued on 12 July 2012⁸ has been based on such representations to a large extent.

Bringing non-compliance to the notice of MoEF / MoTA through petitions and letters can also be useful. The letter should clearly raise objections and highlight violations. Such letters need to be substantiated with as much supporting documentary evidence as possible. It is useful to file an application under Right to Information (RTI) to the Director General of Forests in Delhi and the Chief Secretary of

7 See MoTA minister K. C. Deo's letter highlighting the issue of FRA violations in forest diversion to state Chief Ministers at <http://tribal.gov.in/writereaddata/linkimages/24may20126713834206.PDF>

8 See guidelines issued by MoTA to chief secretaries of all state governments and the administrators of all union territories regarding Implementation of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 at <http://tribal.gov.in/writereaddata/mainlinkFile/File1416.pdf>

the State Government for obtaining information related to FRA compliance in the process of forest diversion.

The addresses are:

1. Ministry of Tribal Affairs (Secretary, Ministry of Tribal Affairs, Shastri Bhavan, New Delhi 110 001).
2. Ministry of Environment and Forests (Director General of Forests, Member-Secretary, Forest Advisory Committee, Ministry of Environment and Forests, Paryavaran Bhavan, CGO Complex, New Delhi 110 003).
3. Copies of such letters could also be sent to the State Chief Secretary, the State Department of Tribal Welfare and the District Collector.

10. What is the process for lodging an appeal before National Green Tribunal?

The State Governments and Union Territories, after receiving final (Stage – II) approval under the FCA, 1980 from the Central Government, are to pass an order under section 2 of the FCA diverting the forest land for non-forestry purposes. This order of State Government can be assailed by filing an Appeal before the National Green Tribunal (NGT) (stipulated by Sec 2(A) of FCA and Sec 16(e) of the National Green Tribunal Act.)

This has been reiterated in the orders passed by the National Green Tribunal dated 7th November 2012 in the Appeal No. 7/2012 (Vimal Bhai & Anr. Vs Union of India & Ors.) as quoted below:



"31. ..The said order along with the conditions imposed by the Central Government according Stage – I and Stage – II Clearance is mandatorily required to be displayed in the website....Apart from the said action the State Government should also insist that the Project Proponent should publish the entire forest clearances granted in verbatim along with the conditions and safe-guards imposed by the Central Government in Stage – I Forest Clearance in two widely circulated daily newspapers one in vernacular language and the other in English language so as to make people aware of the permission granted to the Project Proponent for use of forest land for non-forest purposes. The cause of action for filing an Appeal would commence only from the date when such publication is made in the newspapers, as well as from the date when the forest clearance and permission to use the Forest land for non-forest purpose is displayed in the website of the concerned State Government or the MoEF, as the case may be. ."

The above-mentioned order clarified that:

"An Appeal can be filed against the said order of the State Government under Section 2 (A) of FC Act and/or under Section 16 (e) of the NGT Act. In the event such an Appeal is filed it would be open for the person aggrieved, to assail the order/Clearances granted by the Central Government under Section 2 of the Act which forms an integral part and sole basis of the order passed by the State Government."

Therefore, it is evident that the entire process of Central Government approval, including compliance with the FRA circular dated 3-8-2009, which forms the basis of an order to be passed by the State Government diverting forest land to the User Agency, can be challenged in the process of approaching the NGT.

It needs to be added, that people are further free to challenge the forest clearance, including FRA compliance, at the stage of in-principle (Stage-I) or final (Stage-II) approval by Central Government in the High Courts or Supreme Court. But a challenge cannot be made at this stage, prior to a State Government order, in the NGT.

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) AND DIVERSION OF FORESTS UNDER FOREST CONSERVATION ACT 1980 (FCA) - (Exploring the role of FRA within the processes of Forest Diversion under FCA)

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