

Compensatory Afforestation and Net Present Value Payments for Diversion of Forest Land in India



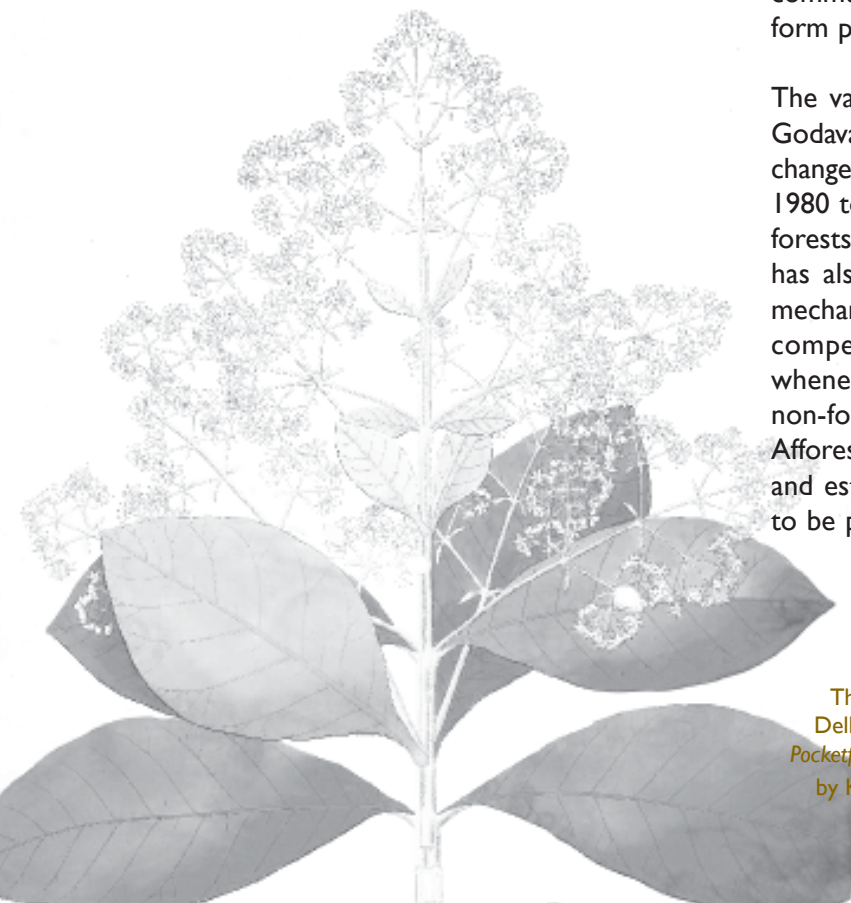
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India's Constitution lists "Forests" in its Concurrent list, making it subject to the administration and management of both wings of a federal structure: the State and Central Governments. At the national level there are a range of laws and policies that have determined forest ownership and have put forth mechanisms that restrict or release forests to its "potential" users. Each state has also had its own set of legal frameworks based on the national legislation on forests. In the last two decades, forest governance has also seen an active influence of the apex court of the country and expert committees. All this has had a significant and sometimes conflicting effect on how forests are viewed. These different ways in which forests are presented or represented in administrative and legal debates and processes have a profound effect on the lives and livelihoods of forest dwelling and tribal communities as well as on biodiversity and wildlife, all of which form part of the lived forest.

The various orders passed by the Supreme Court in the T.N. Godavarman case (W.P.C.202 of 1995) resulted in an formidable change in the jurisdiction of the Forest (Conservation) Act (FCA), 1980 to any forest that would satisfy the dictionary meaning of forests. What the legal debates and decisions as part of this case has also lead to is elaborate upon and establish institutional mechanisms that would manage funds relate to carrying out compensatory afforestation and other monetary payments whenever forest land under FCA jurisdiction is diverted for non-forest use. Specifically these include the Compensatory Afforestation Planning and Management Authority ("CAMPAA") and establishment of Net Present Value ("NPV") methodology, to be paid by user agencies for diversion of forest land.

This briefing paper has been put together by Srilekha Sridhar, Advocate, Delhi High Court. It draws substantially from the Kalpavriksh publication *Pocketful of Forests: Legal Debates on compensating an valuating forest loss in India* by Kanchi Kohli, Manju Menon, Vikal Samdariya and Sreetama Guptabhaya.





What is a “non-forest use”?

The law, i.e. the Forest (Conservation) Act, 1980 (“FCA”) broadly defines a non-forest use as the breaking up or clearing of any forest land for the purpose of cultivation of certain specified crops or for any purpose other than re-afforestation. Even though, ostensibly the legislation was enacted for the purpose of conservation, it also lays down the procedure for diversion of forests for non-forest uses.

How can forests be diverted?

The central legislation that deals with diversion of forests for non-forest uses and the procedure for the same is the FCA and the Rules framed thereunder. Every change of forest land to a non-forest use is to be compensated by the user agency for the purpose of compensatory afforestation. It is one of the most significant conditions stipulated under the FCA when permitting the diversion of forests.

How is compensatory afforestation carried out?

As per the MoEF’s guidelines, compensatory afforestation is required to be done over an equivalent area of non-forest land or double the amount of degraded forest land in relation to the actual area being diverted. Special provisions are stipulated for certain categories of projects such as those undertaken by the Central Government or for public utility projects. In order to determine the cost of compensatory afforestation, the appropriate authority will evaluate the area of the forest area/degraded identified for compensatory afforestation.

Before the intervention of the Supreme Court, the money for compensatory afforestation was deposited with the respective State Governments. The user agency’s role in afforestation ends after depositing the amount and the actual task of carrying out compensatory afforestation was left to the State Government. At present, the amount for compensatory afforestation is deposited with the ad-hoc CAMPA set up through a series of debates in the Supreme Court and executive orders subsequently. The details follow in the subsequent sections.

Institutionalising compensation:

The genesis and structuring of the CAMPA

The Godavarman Case and Compensatory Afforestation:

In 1995, forest policy and governance first came before the Supreme Court in *T.N. Godavarman Thirumalpad v. Union of India* (W.P. (Civil) No. 202 of 1995), popularly known as “the Godavarman case” and the Supreme Court continues to issue interim orders on several aspects such as tree felling, exemption from payment of NPV, de-reservation of forests, etc. The Godavarman case has resulted in substantial changes in policy for diversion of non-forest land and administration of the same based on reports from across the country on the implementation of compensatory afforestation, as also recommendations from various expert Committees.

Setting up the Central Empowered Committee (CEC):

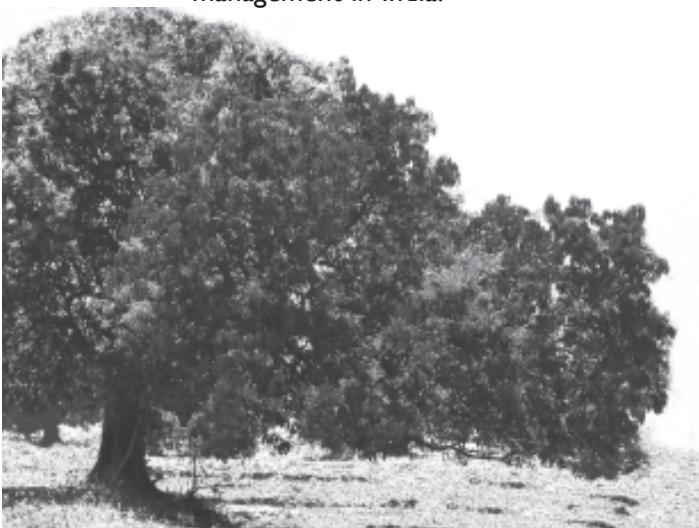
On 9.05.2002, the Supreme Court ordered the setting up of the CEC in pursuance of Section 3(3) of the Environment (Protection) Act, 1986 (EPA), in order to assist the Court as well as monitor the implementation of the Court’s orders. The order explicitly stated that apart from monitoring the implementation of its orders, its functions would also include looking into cases of non-compliance, implementation of working plans and other conservation issues. The CEC was initially set up for a period of five years and has been renewed twice since then with a change of roles and jurisdictions. The committee filed a report dated 9.08.2002 regarding the state of compensatory afforestation management in India.

Pre-CAMPA conditions

By way of its order dated 3.4.2000 filed by the National Mineral Development Corporation (“NMDC”), where a number of issues pertaining to implementation of compensatory afforestation and associated funds came to the fore, the Supreme Court observed that only 10% of the compensatory afforestation had been carried out. The Supreme Court also took note of the position of cases approved for diversion of forest land, the extent of use of funds realized and yet to be received by the States.

The Additional Solicitor General also submitted information on the position of cases approved for diversion and the extent of compensatory afforestation being carried out. The Court observed that there was a shortfall of 36% in the total afforestation to have been done by the states put together. Even though states had received the money from user agencies, the same had not been utilized.

In its order dated 8.9.2000, the Court observed that the practice of user agencies merely applying for and depositing money for compensatory afforestation may not be in keeping with the FCA and Rules and stated that, prima facie, the responsibility of afforestation should be with the user agency. The Court also took note of the Additional Solicitor General’s recommendations that the guidelines on compensatory afforestation needed to be upgraded. It also observed that not only should it be mandatory



to follow the Rules and guidelines in this regard, but compensatory afforestation should be a time bound exercise. It also emphasized the requirement for an environmental audit to be carried out by user agencies with respect to survival rate of sapling and determine whether or not approvals for diversion should be withdrawn on the basis of such audits. Thus, the court clearly placed the onus of compensatory afforestation on the user agencies, as opposed to the States.

In its order dated 23.11.2001 in I.A. No. 566, the Supreme Court took note of the affidavits filed by the States, which indicated that large sums of money had been realized by the States from user agencies for this purpose, but only about 83% of the amount collected had been utilized. Further, about Rs. 200 crores was yet to be realized from user agencies. The court also directed the MoEF to formulate a new scheme for compensatory afforestation and stated that it would be the responsibility of the user agency to ensure that the money for afforestation is deposited and the appropriate government releases land for the purpose.

Genesis of CAMPA

The CEC, in its aforementioned report concluded that out of the total funds recovered from user agencies towards compensatory afforestation, only 60% had been utilized and only 61% of the total target area had been covered. The report showed that the existing practices of fund disbursement and management did not allow for effective afforestation. The report recommended the following:

- Protection of existing forests be seen as a legitimate activity of compensatory afforestation;
- Changing the then valuation of forests and adopting Net Present Value (NPV) in forest policies;
- A new, independent and direct mechanism for collection and disbursal of compensatory afforestation funds (CAF) between the Centre and the State.

Interestingly, this final proposal also found favour with the MoEF and was not objected to by any of the States, the stage was set for the initiation of the CAMPA. The Supreme Court to propose a body for management of CAF and a comprehensive set of rules and guidelines were sought from the MoEF in this regard.

Constitution of CAMPA

By its order dated 30.10.2002, the Supreme Court directed the constitution of CAMPA, in pursuance of

which, the MoEF issued a notification dated 23.04.2004 to that effect. The body was to manage CAF, NPV and any other amounts recoverable under the FCA from user agencies for non-forest uses of forest land. As per the notification, CAMPA was to be managed by the following bodies:

- Governing Body (at the national level): to review CAMPA's policy framework and monitor utilization of funds.
- Executive Body (at the national level): to take care of day to day functions and administration of CAMPA such as receipt and investment of funds, etc.
- Steering Committee (state level): to facilitate policy decisions
- Management Committee (state level): to prepare the Annual Plan of Operation ("APO") for approval from CAMPA.

The notification also envisaged that the money that is received for compensatory afforestation, NPV (as described in the next section) and diversion of protected areas, etc may be used for site-specific schemes received with proposals for diversion of forest land under the FCA. The CAMPA was also authorised to disburse funds to the concerned States in predetermined installments as set out in the state-level Annual Plan of Operation (APO).

The notification led to several applications from individual user agencies seeking reductions, exemptions and review. Apart from these, there was also a challenge to the notification on the issue of the lack of NGO involvement in the CAMPA organisation structure. However, the court questioned the necessity of involving NGOs and sought recommendations with regard to this issue. Further, there has also been a challenge to the constitutional validity of the CAMPA by the State of Kerala.

Watershed Judgment of 25.9.2005:

The various challenges and objections to the CAMPA notification were finally taken up by the Supreme Court on 25.9.2005 in order to lay rest to all issues once and for all. The Supreme Court held that:

- The provisions on constitution of Executive Body be amended to include two more environmentalists, to increase the number of non-governmental members to three;
- Utilization of CAMPA funds be freed from the ongoing practices of various States, and funds received from one State need not be limited to place of origin,

as per the discretion of CAMPA;

- With regard to the constitutionality and question of accountability of CAMPA in terms of legislative or parliamentary control and how an authority could collect deposits for government property, i.e. forest land, on behalf of the government, the Supreme Court held that collection of monies by CAMPA was for the purpose of conserving a national, intergenerational, public asset and not government property;
- Such deposits could not be treated as a source of revenue to the government, but was for the purpose of preservation of natural resources and the notification laid down measures to ensure financial discipline and accountability.

Ad-hoc CAMPA:

Since the order of the Supreme Court dated 30.10.2002, money towards compensatory afforestation was being deposited with the CEC by user agencies, with the intention of transferring the same to CAMPA upon its constitution. However, the delay in the constitution of CAMPA resulted in about Rs. 79 crores remaining un-utilized with the CEC. Since there was no conclusion with respect to CAMPA, the Supreme Court finally directed the setting up of an ad-hoc CAMPA to collect funds from all the States towards compensatory afforestation. By its order dated 15.9.2006, details of the ad-hoc committee were specified and the Court took note of the amount of money already collected by the CEC. Despite the said order, the ad-hoc body was only constituted almost two years after.

It was also brought to the notice of the Court by the CEC that nearly Rs. 5600 crores of CAF and NPV was lying unutilized by the ad-hoc CAMPA. The Court sought response from the MoEF and finally, by way of its order dated 10.07.2009, ordered the release of funds from the ad-hoc CAMPA for utilization, based on a scheme proposed by the CEC.

The Official Estimation of NPV:

NPV was defined by the Supreme Court in its landmark decision dated 26.09.2005 to be “the present value of net cash flow from a project, discounted by the cost of capital.” In common parlance, it is the sum arrived at by deducting the cost of investment from the present value of all future earnings. NPV is a monetised value of forest land to be paid by the user agency to compensate for the loss of tangible and

intangible benefits flowing from such lands. As stated before, the aforementioned decision of the Supreme Court regarded NPV as payment for the protection of the environment and not for making good the loss of any proprietary interest in forest land.

The concept of NPV as an additional sum to be paid towards diversion of forest land was introduced by the CEC in its aforementioned report dated 9.8.2002. While calling for a detailed set of guidelines and a mechanism for collection of NPV be put in place, some of the issues raised by the CEC were:

- The underlying principle behind this practice was because the plantations raised by the forest authorities towards compensatory afforestation never sufficiently compensated for the loss of natural forests.
- The States as well as the MoEF were in agreement that NPV in addition to the CAF should be realised from user agencies.
- Collection of NPV was already being practiced in some states (Madhya Pradesh, Chhattisgarh and Bihar) and provided for a basis of discussion for implementing the same, based on quality and density of forests.

After deliberating on the above issues, the Supreme Court, by orders dated 29.10.2002 and 30.10.2002 accepted the recommendations of the CEC and held that all user agencies were to pay NPV at the rate of Rs. 5.80 lakhs per hectare to Rs. 9.20 lakhs per hectare depending on the quality and density of the forest land (effective immediately and subject to upward revision by the MoEF). The NPV was to be in addition to payments for compensatory afforestation, additional compensatory afforestation, penal afforestation and catchment area treatment plan funds.

However, a number of issues and objections were raised by various parties seeking exemptions from payment of NPV, as well as the MoEF which sought directions with relation to format for NPV calculation and these were finally dealt with by the Supreme Court in the aforementioned landmark decision of 26.9.2005 which in many ways represented a culmination of the Court's discussions on compensatory afforestation, NPV and the CAMPA.

Establishing the NPV Practice: What the 26.9.2005 Judgment said:-

- Among the many issues raised related to the payment of NPV, the Supreme Court was pleased to hold as under:-
- NPV was a method by which future expenditures (costs) and benefits are levelised in order to account



for the time value of money, and this principle would apply to the tangible and intangible aspects of forestry.

- The principles and parameters for valuation of damage have to be evolved keeping in mind the likely impact on an activity of the future generation.

- State Governments could not contend that the NPV amounts should be paid directly to them, in light of the setting up of CAMPA, and also because forests were not State property, but were a part of national wealth.

The aspect of exemptions from NPV payment was also discussed in detail by the Court. It was argued by the Central Government that public utility and welfare projects should be exempted from NPV since these do not have an adverse impact on the environment. The Solicitor General also added that irrigation and hydroelectricity projects be exempted as well. In this regard, the Court held that the issue is not pollution, but change of land use, and distinguished between revenue and non-revenue earning projects. It was held that irrigation and hydroelectricity projects could not be exempt from NPV payment. There was also an objection from the mineral industries, who stated that major and minor minerals should be

treated differently. However, the Court disagreed and held that no such exemption or reduction could be sought when the larger concern was the conservation of forest land. Thus, apart from non-revenue earning public utility projects like government dispensaries, schools, rainwater harvesting tanks, village roads etc be exempt from payment, no other exemptions from NPV were permitted.

The Kanchan Chopra Committee's Contentions:

This Committee was set up pursuant to the decision of 26.9.2005 to (a) identify and define the various parameters for the valuation of forest land, (b) formulate a practical methodology for estimating the monetary values to be made applicable to different geographical regions in the country, and (c) determine what projects ought to be exempted from payment of NPV. Some of the key observations of the report are:

- NPV is only payable for those forest areas that are under the management of the forest department, and not to land which has not been notified under the Indian Forest Act, 1927.

- NPV of a tract of forest and the claims by the stakeholders should be entirely site specific and public hearings should be conducted to appraise all parties regarding diversion of land.

- Twelve specific steps should be followed to determine the value of NPV, taking into account all claims by stakeholders as well as the legal status of the land along with the products and services to be valued.

- Recommended Exemptions:

- § Full exemption for public works like schools, hospitals, children's playgrounds and minor run-of-river and water harvesting projects up to a limited storage area, municipal water supply, drinking water, tribal rehabilitation, etc.;

- § No exemption for mining activities;

- § 30% exemption for major irrigation and hydel power projects, and that too only if no land is diverted from a Protected Area and 90% exemption for wind energy projects

- All projects should be liable to pay ground rent irrespective of exemption status for NPV. Annual payments (accompanied by bank guarantee) for public utility projects and those projects with an NPV

Collecting the Dues:

The Accumulation and Disbursal of Funds from Forest Diversion

Expediting the Institutional Framework and Disbursals:

In its order dated 25.2.2009, the Supreme Court observed that a large amount of funds had been collected by the ad-hoc CAMPA and proposals from various States were pending, and directed the Committee to scrutinize the proposals. However, at this time the CAMPA Bill was defeated in the Rajya Sabha and a meeting was held by the Principle Secretary to the Prime Minister, along with the directions of the Parliamentary Standing Committee and the MoEF to resolve the apparent deadlock with respect to the institutionalization of CAMPA and to formulate and circulate a set of guidelines to States.

In 2009, following the Union elections, the CAMPA, CAF and its implementation was among the first matters reviewed by the MoEF. It became clear that there was a need to reconcile the Supreme Court's directions with the Parliamentary Standing Committee's concerns. Further, the MoEF stressed on the importance of local and State participation in the CAMPA and that all guidelines had to be revised on these terms. It was finally agreed by the MoEF and the CEC that the ad-hoc CAMPA would consider the States's proposal, and the State CAMPA Guidelines were issued on 2.7.2009 which detailed the roles and functions of the State CAMPA and also set up the National CAMPA Advisory Council.

With regard to the use of the funds itself, the Supreme Court, based on recommendations from the CEC observed that a staggered release of funds (10% of the principle amount pertaining to each State) would be preferable to a sudden release of large amounts of money. Until an alternative system is worked out, it was recommended that funds continue to be deposited with the ad-hoc CAMPA.

State CAMPA and its Guidelines:

The abovementioned guidelines provide for a State CAMPA which will be governed by:

- Governing Body: To frame the broad policy and review work periodically
- Steering Committee: To approve the Annual Plan of Operation (APO), monitor utilization of funds and approve annual reports
- Executive Committee: To prepare the APO and supervise the work to be carried out with the funds provided.

The Guidelines require the State CAMPAs to utilize the funds towards development and maintenance of forests and wildlife as per the APO. Expenditures such as salaries, etc should be dervided from the interest generated from the funds. Up to 2% of the expenditure can be utilized for monitoring and evaluation.



National CAMPA Advisory Council

This Council was set up on 13.8.2009 by the MoEF to lay down broad guidelines for the State CAMPAS, approve schemes proposed by States, monitor and evaluate the implementation of the same and also provide scientific and technical assistance to the States to evolve better mechanisms. The existing ad-hoc CAMPA has been envisaged to act as the secretariat for the Council and their expenditures be met out of the provision set aside for monitoring and evaluation of the programme. The Supreme Court also directed that the Council receive 5% of the amounts released to State CAMPAS for such purpose.

Responses from States

By 30. 06.2009, almost Rs. 9932 crores had been collected by the ad-hoc CAMPA, of which about 53% came from five states alone. Understandably, these States were dissatisfied with the decision to release only 10% of the funds per year, and claimed that such amounts were highly inadequate for the purpose of conservation/ They also stated the decision had been taken exclusively by the Central Government, without any discussion with State representatives. The Central Government representatives countered that if implementation was conducted efficiently, the Supreme Court could be approached for transferring the entire amount back to the States.

Mechanism for State proposed disbursements

Since 10.07.2009, disbursal of funds has been carried out as per the 2009 Guidelines. The ad-hoc CAMPA releases funds to the State CAMPA according to their APO, and the State CAMPA disburses the funds to the forest officials in predetermined installments. As envisaged by the Supreme Court and the said Guidelines, the State CAMPAS can only disburse funds related to compensatory afforestation, penal afforestation, Catchment Area Treatment plan etc specific to the scheme submitted by the States along with approved proposals under the FCA. However, the money received for NPV can be directed only towards activities like natural assisted regeneration, forest management and wildlife protection.

Observations on APOs for 2010-11

An analysis of the 25 State APOs filed for 2010-11 reveal that many States have sought large sums for creation of infrastructure like offices, vehicles and laptops. For example, the States of Goa, Andhra

Pradesh and Sikkim have budgeted 67%, 42.45% and 53% respectively of their NPV budgets towards infrastructural requirements. On this point, the Advisory Council held that funds cannot be utilized for creation of infrastructure at the headquarter level, but may be utilized for lower level infrastructural requirements.

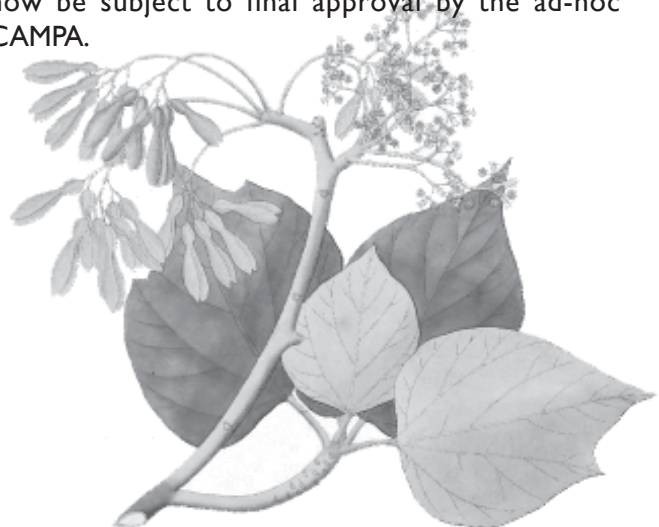
Further, many states had budgeted large sums of money for plantations through their Joint Forest Management Committees, as well as for monoculture plantations including commercial plants like biofuels. On this point, the Member Secretary of the CEC pointed out that the Supreme Court order did not permit utilization of NPV money for plantations.

NPV Funds for Rehabilitation of Communities from Protected Areas

While the 2009 guidelines do provide for utilization of NPV funds for the protection and conservation of forests and wildlife, it is silent on the issue of rehabilitation. To remedy this, a guideline was issued by the ad-hoc CAMPA dated 03.03.2010 that money collected towards NPV could also be used for rehabilitation of communities from Protected Areas declared under the Wildlife Protection Act, 1972.

Monitoring and Evaluation

While the Advisory Council has powers of special inspection and financial audit of utilization of funds by the State CAMPAS, the State Level Steering Committee is also empowered under the 2009 Guidelines to monitor and evaluate works undertaken by the state. Both authorities have the power to withhold further funds if they are not satisfied with the utilization. State governments have started to allocate funds for monitoring and evaluation through their APOs. States like Madhya Pradesh, Sikkim and Himachal Pradesh have proposed amounts, which will now be subject to final approval by the ad-hoc CAMPA.



Conclusion

The Godavarman Case has spanned over 15 years in the Supreme Court and applications continue to be heard every week. The procedure for diverting forest land for non-forest purposes as established under the FCA and the Apex Court's directions have resulted in the diversion of 11,37,686 hectares of forest land for non-forest purposes between 1980 and 2009. The crucial problem has been balancing systematic/official diversion and the in-operational compensatory practices.

Over the last decade, the main concern has been the improper/ non-utilization of funds for carrying out compensatory afforestation. Despite the sweeping

institutional and administrative reforms, improper utilization of funds remains a key concern.

Furthermore, the core issue of the extent of diversion of forests through forest clearances has never been addressed. Other problems include the availability of land for afforestation efforts, social and economic factors affecting afforestation. Many such details have been left to be entirely dealt with by the field level staff without any directions. Merely debating the monetary aspect of the issue without addressing calling the process of approval and forest governance itself into question, it is likely that the problems plaguing compensatory afforestation will continue unabated.



Important Dates and Orders of the Supreme Court:

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|------------------------------|--|
| 12.12.1996 | Expansion of definition of 'forest' |
| 03.04.2000 | NMDC – setting up of CAMPA |
| 08.09.2000 | Supreme Court observed that prima facie, the responsibility of afforestation should be with the user agency and that compensatory afforestation should be a time bound exercise. It also emphasized the requirement for an environmental audit to be carried out by user agencies with respect to survival rate of sapling and determine whether or not approvals for diversion should be withdrawn on the basis of such audits. |
| 23.11.2001 | Supreme Court directed the MoEF to formulate a new scheme for compensatory afforestation and stated that it would be the responsibility of the user agency to ensure that the money for afforestation is deposited and the appropriate government releases land for the purpose. |
| 09.05.2002 | Supreme Court directed the setting up of CEC |
| 29.10.2002 and 30.10.2002 | Supreme Court directed all user agencies were to pay NPV Rs. 5.80 lakhs per hectare to Rs. 9.20 lakhs per hectare depending on the quality and density of the forest land |
| 30.10.2002 | Supreme Court directed the constitution of CAMPA |
| 26.9.2005 | Kanchan Chopra Committee was directed to be set up |
| 26.9.2005 | Landmark decision of the Supreme Court marking culmination of the Court's discussions on compensatory afforestation, NPV and the CAMPA. The court passed directions regarding calculation of NPV, issues related to the CAMPA notification, exemptions and other issues. |
| 15.09.2006 | Details of the ad-hoc CAMPA were specified by the Supreme Court |
| 02.01.2007 | CEC's supplementary report on the issue of exemptions |
| 23.12.2008 | CAMPA Bill passed by the Lok Sabha. |
| 22.10.2008 | Department Related Standing Committee on Science & Technology, Environment & Forests, Rajya Sabha presented its report to the House. |
| 05.05.2008 | CAMPA Bill was introduced in the Indian Parliament. |
| 10.07.2009 | Supreme Court directed the release of funds from the ad-hoc CAMPA for utilization towards compensatory afforestation |
| 02.07.2009 | State CAMPA Guidelines issued by the MoEF |
| 13.8.2009 | National CAMPA Advisory Council was directed to be set up |
| 03.03.2010 | Guidelines issued by the ad-hoc CAMPA to permit use of NPV funds for rehabilitation of communities from Protected Areas |

Abbreviations:

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| APO | Annual Plan of Operation |
| CAF | Compensatory Afforestation Fund |
| CAG | Comptroller and Auditor General |
| CAMPA | Compensatory Afforestation Planning and Management Authority |
| CEC | Central Empowered Committee |
| EPA | Environment (Protection) Act, 1986 |
| FCA | Forest (Conservation) Act, 1980 |
| I.A. | Interim Application |
| MoEF | Ministry of Environment and Forests |
| NMDC | National Mineral Development Corporation |
| NGO | Non-governmental organisation |
| NPV | Net Present Value |



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Images from Kanchi Kolhi were also used in this brief