

To

**The Rajya Sabha Select Committee
on Coal and MMDR Amendment Ordinances/Bills**

**Representation from the Goa Foundation, Goa
(Petitioner in Writ Petition No.435/2012 before the Supreme
Court of India)**

Key issues in brief:

The MMDR Amendment Act 2015, based on the ordinance of similar name and date, has been referred to a Select Committee by the Rajya Sabha, after being passed in the Lok Sabha. Certain sections of the Bill need to be opposed. The Goa Foundation presents its arguments against some of the proposed amendments to the Select Committee in public interest.

The proposed sub-section 8A(4) of the Amendment bill requires auctions at the expiry of existing leases. As witnessed in the recent coal auctions, this is in the public interest. A number of features of the Amendment Bill, however, undermine the requirement of auction and getting maximum revenue.

For instance, the proposed sub-sections 8A(3), (5), (6) and 10A (2) (b) all result in the grant of leases, renewals or extensions of mining leases without auction. This is tantamount to transferring the wealth of the States, and therefore of the people, to miners. This violates constitutional provisions **and is also in violation of the Supreme Court's findings in coal allotment and spectrum judgments. These sub-sections must be deleted as they seek to transfer publicly owned resources to parties without payment, against the public interest. This process of transfer of wealth from public ownership to private parties must be reversed, or the Center must compensate the owners, i.e., the people of the States, for their lost property.** Our detailed recommendations are given later.

Quick summary

At the heart of it, there are three ideas emanating from the Constitution concerning natural resources like coal, natural ores or spectrum:

(1) The States (not the Centre) are the owners of sub-soil minerals – these are Commons, owned by the public.

(2) When alienating mineral assets, the State should get the full value of our sub-soil minerals – else, the public is being cheated (Public Trustee principle); and,

(3) These sub-soil minerals, being inherited assets, belong to our future generations as well, so we must save the money received, not squander it – else our children are being cheated of their inheritance (Intergenerational Equity principle).

It is important to note that these are Constitutional principles – the MMDR & Coal Acts cannot subvert the Constitution. Also these principles apply across the nation, and to all non-renewable natural resources of the Government, not just coal and spectrum.

One of our findings is that historically, the State governments, as public trustees of minerals, are realizing only a small fraction of the value of these resources. This is nothing but a second enclosure movement. The losses in Goa are around Rs. 40,000 per capita per year for eight years, more than twice the poverty line figure¹! This is a huge regressive hidden poll tax on the aam aadmi. This is simply unacceptable. And worse, these are inherited assets, so we are expropriating the inheritance of our children!

The new MMDR and Coal ordinances, while a step forward in some ways, still do not meet the basic requirements of:

(a) States capturing 100% of the value of their Commons, and,

(b) Investing these capital receipts into new productive assets for the future generations.

¹ Please see our Proposal to the Goa Government. (<http://bit.ly/1llyuVV>)

Detailed explanation

(1) Sub-soil minerals as the Commons:

Sub-soil minerals are common property of the people. They are owned by the States as public trustee for the people. Sub-soil minerals are not owned by the Center, the land owner or the mining lease holder. They are part of the Commons of the people of the state.

The Ministry of Mines Annual Report 2013-14 (para 3.19) says: “In the federal structure of India, the State Governments are the owners of minerals located within their respective boundaries. The Central Government is the owner of the minerals underlying the ocean within the territorial waters or the Exclusive Economic Zone of India.”

(2) Public Trustee principle:

We should get the full value of our Commons – else, the public is being cheated. This is common sense. In the Meerut Development Authority case [(2009) 6 SCC 171], the Supreme Court held:

“Whenever the Government or the authorities get less than the full value of the asset, the country is being cheated; there is a simple transfer of wealth from the citizens as a whole to whoever gets the assets `at a discount’.”

A key metric or indicator of what is happening is the “capture rate” – what % of the value of the mineral is recovered when sold by government? The target capture rate is 100% – anything less is cheating the public and would be violating Supreme Court's findings. To illustrate with a simple example: if we sell our family gold, we invariably get 100% of the value. However, this is never the case with sale of our natural resources, where we get practically nothing.

India's experience

The States sell sub-soil minerals through mining leases, and earn royalty in return, as per the pre-ordinance MMDR & Coal Acts. The value of the ore can be calculated

as revenues minus all associated expenses, including a reasonable return on assets (10-15%). Calculations from published annual reports show that for the eight year period (2004-05 till 2011-12), for example, the states from which Sesa Goa mined received less than 5% of the value of the iron ore (instead of 100%). Ten years of NMDC annual reports reveal that the owners of the iron ore in the states in which this public corporation has worked, received less than 8% of the value of their minerals. Available data for 15 years of oil & gas gives a capture rate of only 35%. The current coal auctions clearly demonstrate that in the past coal has also been sold for a pittance compared to its true value. These minerals constitute around 80% of our mineral production, so the problem is widespread and systemic.

Our calculations showed that for the eight year period (2004-05 till 2011-12), the state of Goa, for example, has captured less than 5% of the value of its iron ore! 282 million tons of iron ore assets were exported. This reduced the collective wealth of the state by Rs. 53,833 crores or Rs. 3.69 lakhs for each man, woman or child. In return for the huge decline in common wealth, the state received only Rs. 2,387 crores as royalty. In comparison, total government receipts for that period from all sources were only Rs. 27,402 crores.²

Each and every man, woman and child, in Goa, whether rich, poor or in debt, lost assets worth Rs. 40,000. Each year! For eight years! This is more than 2 times the poverty line figure. This is not right. This is nothing but a second enclosure movement. This is a transfer of wealth from the public to the rich. Natural resources represent the largest common wealth of our nation. We cannot fritter it away like this. This is a highly regressive hidden poll tax – every person has a equal share in the common wealth that is lost. This is not what a socialist nation does. These procedures raises moral, ethical, religious, and human rights issues.

Is maximization of capture rates the only consideration ?

In the Presidential Reference on the issue of Alienation of Natural Resources (2012) 10 SCC 1, the Supreme Court has held that when:

² Proposal to Chief Minister, Govt. of Goa on mining in Goa dated 15-May-2015
(<http://bit.ly/1llyuVV>)

“Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximizing private entrepreneurs, adoption of means other than those that are competitive and maximize revenue may be arbitrary and face the wrath of Article 14 of the Constitution.”

If there are other criteria also involved in the final policy decision, such as social or welfare purposes, clearly these need to be compared against the under-recovery on the value of the asset. However, the previous calculations for Sesa Goa and NMDC also clearly demonstrate that the lost value of the minerals far outweighs other social / welfare purposes like income from employment or mining dependent activities.

It is also clear that simply using competitive methods such as auctions is not enough. Maximizing revenue remains the key principle when alienating natural resources.

What Capture Rates are achievable?

International experience is that several countries capture 90+% of the value of their minerals.³ International experience also shows that such high rates can be achieved only by state-owned mining corporations. Auction of leases will not achieve 100% capture of the value of these natural resources. Private entities cannot control risk of Government, hence they will discount the value. Only public sector ownership of the ore, until final auction of processed ore, can achieve 100% capture. Private entities can operate leases on a price per ton or similar basis.

The seriousness of the scale of loot of public resources can be gauged by the fact that the iron ore still remaining in the ground in Goa is conservatively worth Rs. 17 lakhs per man, woman and child. A capture rate of <5% gives Rs. 80,000 per person. A capture rate of 100% gives Rs. 17 lakhs a person, or Rs. 68 lakhs a household. Current NSSO studies (70th round) show the Average Value of Assets (AVA) in Goa

³ See Rents to Riches, Annex 4.3 on page 162.

https://publications.worldbank.org/index.php?main_page=product_info&products_id=2411

is only Rs. 10.44 lakh a household. Clearly, the value of the Commons dominates all else.

(3) Intergenerational Equity principle:

Intergenerational equity can be simply stated as the principle that future generations need to have equal access to resources as the present generation. The Commons, being inherited assets, belong to future generations of Indians as well. Consequently, we must save the money received, not squander it – else our children are being cheated of their inheritance. This is also common sense, and customary in India.

“Hartwick’s rule” states that as mineral resources are depleted (i.e. extracted from the ground), investments in productive assets need to be made to at least the same extent. This ensures that future generations (our grandchildren and their grandchildren) have as much assets as the present generation.

Therefore, the Government, as owner in trust of the natural resources, should capture 100% of the value of its assets, and invest this into new productive assets. We have dealt with the issues around the low Capture Rate. In order to create productive assets, our recommendation is to create Permanent Funds along the lines of Norway. This would require reinvest upto inflation in order to make the fund truly permanent. The real return could be spent on social security, restoring the environment, health, education, etc.

Forty countries and 13 sub-national entities have established Permanent Funds from natural resources. In India, the Supreme Court has mandated the establishment of a Goa Iron Ore Permanent Fund based on a proposal made by the Goa Foundation. This is a valuable precedent.

The value of the remaining Goa iron ore works out to Rs. 17 lakhs per capita! Even a 3% real return will amount to Rs. 51,000 per capita in perpetuity! We can actually create a meaningful social net.

What should States be doing?

It is clear that States are failing miserably as Public Trustees when permitting mining by third parties under the pre-ordinance and post-ordinance provisions of the MMDR & Coal Acts. Therefore, it is imperative that a new mechanism is devised in order to ensure 100% Capture Rate for any fresh mining leases issued. This is necessary in order to comply with the Public Trustee principle.

Examining the specifics of the MMDR & Coal Ordinances 2015

In light of the above, let us look at the unconstitutional portions of the MMDR & Coal ordinances.

- 1) Proposed new sub-section 8A (2) proposes that all new mining leases be given for a fifty year period. Fifty year lease period is too long. It gives away control for far too long. 20 year non-renewable leases are sufficient. Rarely does the private sector look for returns over a longer period. This provision simply hands over States' wealth to miners at leisure! States deserve flexibility in opting for shorter lease periods which was a good feature of the unamended MMDR Act.

We recommend: Period of lease valid for a maximum of 20 years only.

- 2) Though the Ordinance/Bill on the surface seeks to allow grant of new leases for mineral extraction only through auction, certain **concessions** have been made that all result in the grant of leases, renewals or extensions of mining leases without auctions. We refer in particular to proposed sub-sections 8A(3), (5), (6) and 10A (2) (b).

This is tantamount to transferring the wealth of the States, and therefore of the people, to miners. This violates the constitution **and is in violation of the Supreme Court's findings in coal allotment and spectrum judgments. These sub-sections must be deleted as they seek to transfer publicly owned resources to parties without payment, against the public interest.**

- a) Proposed sub-section 8A (3) extends existing leases to be valid for 50 years. Mere extension of leases is tantamount to transferring the wealth of the States, and therefore of the people, to miners.

- b) Proposed new section 8A (5) & (6): These clauses have in fact extended the existing lease / renewal periods to (a) the present lease period; (b) 2020 (for non-captive users) or 2030 (for captive users), or (c) fifty years in total, whichever is the later of all three. Obviously, there will be many leases where choices (b) or (c) above are later than the present lease period. Further, a close reading of the proposed sub-section indicates that even leases that have not been renewed will be automatically renewed under this section.
- c) Proposed new sub-section 10A (2) (b): The Committee may also examine the implications of proposed new sub-section 10A (2)(b). Under this sub-section, category of persons granted either reconnaissance or prospecting leases before the commencement of the Ordinance/Bill is also allowed to bypass the auction regime entirely.

This is not required at all. In fact, it seeks to reward mining companies and leaseholders who in the main held the mining sector to ransom and indulged in wanton illegal mining till the reports of the Justice Shah Commission of Inquiry brought them to book. Countless leases will get renewals, extensions or fresh leases without paying for the full value of those mineral resources. These sub-sections therefore continues the practice of granting mineral resources free of cost to parties, despite the Supreme Court's judgments in respect of recovering maximum value in coal allotments and spectrum.

Further, under the proposed amendments, while one class of lessees will be paying the value of the ore through auction in advance, certain persons are being privileged to get access to mineral resources without payment of the value of the ore. Besides, being a huge hidden transfer of wealth from the poor to the rich, it is also discriminatory.

It is our understanding that most mineral rich areas are already under reconnaissance / prospecting leases. If this clause is allowed to stand, it completely disembowels the main provision of granting leases under auction. This will effect a hidden enclosure movement, a huge transfer of wealth from the countless poor to a few rich miners. This is not right! This must be reversed, or the Center must compensate the owners, i.e., the people of the States, for their lost property.

We therefore recommend deletion of proposed sub-sections 8A (3), (5), (6) and 10A (2) (b).

- 3) In Goa, where influential miners reside (many found with illegal foreign accounts), mining leases have been granted second renewal *en masse* precisely before 12 January, 2015 under Section 8 (3) of the unamended Act, obviously with prior information about the ordinance being made available to the State Government. (Both governments at Goa and Centre belong to the BJP, which has over the years accepted large amounts from mining companies.) Under the new provision 8A (6), they are entitled to mine till 2027 (from 2007). Thus a total of 88 mining leases have been gifted to Goa mining companies, all involved in gross mining violations established by the reports of the Justice Shah Commission of Inquiry and later, by the Central Empowered Committee of the Supreme Court of India.

- 4) In some coal auctions, the price is capped or use specified. The reason given is that the eventual price of power is lower. However, power is consumed largely by the rich, and there are many owners of coal who still don't have access to grid power. This is also a redistribution of wealth. Let users of power pay the full price. Any subsidies can be directly given using the JAM mechanism. Otherwise, let the Center compensate the states for the lost value of their mineral assets.

What needs to be done

It is clear that the present MMDR & Coal Acts, even with the proposed bills, do not meet the requirements of the Constitution. The reasons are not hard to find. Nowhere in these Acts is the basic concept of maximizing capture rates due to ownership of minerals recognized – not in the preamble to the Act, not in any of the Rules or Regulations, and not in Vision, Mission or KRAs of the Ministry of Mines or Ministry of Coal.

We have drawn on significant work done worldwide on similar issues, and have drawn our recommendations from these best practices. Our recommendations include :

- 1) The MMDR Act 1957 needs restructuring to make conservation of the wealth of the people its paramount goal. Some states are seeking this, but the control is all with the Center as reflected by issue of the MMDR ordinance, and increasingly so. Right now, except for the grant of fresh leases, mining activity is going to continue as it has done in the past, with miners not having to pay full value of the mineral ore which, as per the Constitution of India, belongs to the people of the state. The present amendments are quite inadequate against such the goal Parliament must reach.
- 2) There should be a requirement in the MMDR and other relevant acts for all Governments to provide a detailed estimate of the assets of the people – all mineral deposits and minerals within leases, giving volume, quality and estimated value of the mineral reserve. Similarly, all mineral lease holders should have an obligation to make similar disclosures on an annual basis, as often these estimates are revised.
- 3) It is imperative that the MMDR Act require the Government to disclose its estimated Capture Rate from every new lease, as well as provide an annual report of the actual Capture Rate.
- 4) All receipts from mining should be treated as Capital Receipts on account of being a sale of assets. Presently, Royalty is treated as a Revenue Receipt.
- 5) Also deriving from the Public Trusteeship principle, from the time of enactment of the Amendment, it must be the policy of the state to terminate any and all existing leases, where legally possible, in order to enable a regime with a higher Capture Rate.
- 6) All States/UTs/Center be required to set up such Pension or Endowment Funds for their people. This would ensure that the common wealth of the people is not dissipated. The Constitution may require amendment to ensure that these Funds are not subject to any charge/mortgage/lien.
- 7) Proper management of the Permanent Funds would require professional fund managers to manage such large portfolios, along with a large dollop of transparency in order to ensure citizen oversight. The National Pension Scheme

offers a model of implementation. The multiple Permanent Funds all over the globe offer other models to emulate.

- 8) Policy on rate of extraction of mineral resources : A specific policy would need to be created to determine the rate of extraction, taking into account:
- a) Environmental sustainability of mining operations. Frequently, mining operations exceed the carrying capacity of the environment of the region.
 - b) Current and anticipated commodity prices. Extraction should be greatest during periods of high prices. Thought needs to be given to the creation of “swing” capacities to enable greater extraction in periods of higher prices.
 - c) The need for income in the Government budget.
 - d) The likelihood of generating real returns through the Fund in future. Initial analysis shows that achieving real returns on a sustained basis will not be easy but one has no other pathway to adopt as an alternative strategy.
- 9) Policy on where the extract first: Clearly, preference should be given to brownfield sites and existing mines instead of disturbing new areas.

There are a number of other recommendations on monitoring, transparency and controls that have been elaborated upon in our letter dated 11-August-2014 to the Minister of Mines (www.goafoundation.org/mining.)

In conclusion

Given the sums involved, it is clear that this is probably the single largest fiscal decision ever to be consciously taken, as it vitally affects the handling of the natural resources and wealth of this country and its people. Our nations’ economic future is in your hands.

In the light of what has been stated above, we hope your Committee will ensure defeat of the offending provisions in the ordinance/bill.

In case this is required, we are happy to reach Delhi at short notice from Goa to present to the Select Committee, if we are granted a hearing.



(Dr Claude Alvares)
Director

Encl :

- 1) Proposal to Chief Minister, Govt. of Goa on mining in Goa dated 15-May-2015 (<http://bit.ly/1llyuVV>).
- 2) Letter to PM Narendra Modi, appraising him of the mining situation in Goa (<http://bit.ly/1MtUISQ>).
- 3) Letter to Mahendra Singh Tomar, Minister for Mines, on the above issues with a detailed proposal.

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