Dear

As you are aware, the Constitution of India enjoins upon the National Commission for Scheduled Tribes to monitor and evaluate all matters relating to the safeguards provided for the Scheduled Tribes under the Constitution, any law for the time being in force and under any order of the Government, and to participate in the planning process of socio-economic development of Scheduled Tribes. Clause (9) of Article 338A of the Constitution further provides that "the Union and every State Government shall consult the Commission on all major policy matters affecting Scheduled Tribes."

2. In pursuance of its Constitutional mandate, the Commission has critically examined the Land Acquisition (Rehabilitation & Resettlement) Bill 2011, the Mines and Minerals (Development and Regulation) Bill 2011 and the National Food Security Bill, 2011. Keeping in mind their significance for the Scheduled Tribes and Scheduled Areas of the country, the views of the National Commission for Scheduled Tribes on the above mentioned three Bills were forwarded to the Prime Minister for suitable consideration.

3. Since the above-mentioned legislations will have immense and far-reaching effects on the living conditions and socio-economic development of the tribals, I am forwarding copies of the views of the Commission on the Bills for your attention so that you may keep the same in mind whenever the Bills are discussed in Parliament.

With regards,

Yours sincerely,

(Dr. Rameshwar Oraon)

All Scheduled Tribe MPs
Member of Parliament
(Lok Sabha/ Rajya Sabha)
New Delhi

Encl: views/comments on the three bills (Annex-I, II and III)
List Attached

Residence : 103, New Moti Bagh Complex, New Delhi - 110023   E-mail : chairperson@ncst.nic.in
LIST OF MEMBER OF PARLIAMENT (ST), LOKSABHA

01 To
Shri Thangso Baite, MP
14, North Avenue,
New Delhi – 110 001

02 To
Shri Devidhan Besra, MP
C-2, A-Block, M.S. Flats,
B.K.S. Marg, New Delhi – 110 001

03 To
Dr. Pulin Bihari, MP
405, V.P. House, Rafi Marg,
New Delhi – 110 001

04 To
Shri Tarachand Bhagora, MP
33, Feroze Shah Road,
New Delhi – 110 001

05 To
Shri Kantilal Bhuria, MP
8, Talkatora Road,
New Delhi – 110 001

06 To
Shri Hemanand Biswal, MP
7, K. Kamraj Lane,
New Delhi – 110 011

07 To
Shri Sansuma K. Bwiswmuthiary, MP
7, Feroze Shah Road,
New Delhi – 110 001

08 To
Dr. Tushar A. Chaudhary, MP
6, G.R.G. Road,
New Delhi – 110 001

09 To
Shri Harishchandra D. Chavan, MP
C-6, A-Block, MS Flats,
B.K.S. Marg, New Delhi – 110 001

10 To
Shri V. Kishore Chandra Deo, MP
64, Lodhi Estate,
New Delhi – 110 003

11 To
Smt. Jyoti Dhurve, MP
110, V.P. House,
New Delhi – 110 001

12 To
Shri Biren Singh Engti, MP
17, Windsor Place,
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LIST OF MEMBER OF PARLIAMENT (ST), LOKSABHA

25 To
Shri Kariya Munda, MP
1, Sunehari Bagh Road,
New Delhi – 110 001

26 To
Shri Porika Balram Naik, MP
32, Meena Bagh Maulana Azad Road,
New Delhi – 110 011

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Shri S. Pakkirappa, MP
190, North Avenue,
New Delhi – 110 001

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Shri Vincent H. Pala, MP
21, B.R. Mehta Lane,
New Delhi – 110 001

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144-146, South Avenue,
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Shri Sohan Potai, MP
172, North Avenue,
New Delhi – 110 001

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Shri Gajendra Singh Rajukhedi, MP
203-204, South Avenue,
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33 To
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34 To
Shri Ramsinh P. Rathwa, MP
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35 To
Shri Baju Ban Riyan, MP
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36 To
Shri C.L. Ruala, MP
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Shri Vishnu Deo Sai, MP
70, North Avenue,
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43  To
Shri Makhansingh Solanki, MP
313, V.P. Singh,
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Kum. Agatha K. Sangma, MP
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44  To
Shri Shibu Soren, MP
224, North Avenue,
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39  To
Shri Hamdullah Sayeed, MP
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45  To
Dr. (Smt.) Prabha Kishor Taviad, MP
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40  To
Smt. J. Shantha, MP
192, North Avenue,
New Delhi – 110 001

46  To
Shri Manohar Tirkey, MP
421, V.P. House,
New Delhi – 110 001

41  To
Shri Murarilal Singh, MP
91, North Avenue,
New Delhi – 110 001

47  To
Shri Laxman Tudu, MP
92, North Avenue,
New Delhi – 110 001

42  To
Smt. Rajesh Nandini Singh, MP
W-18, Green Park (Main),
New Delhi – 110 016

48  To
Shri Chongshen M. Chang, MP
12-A, G.Fl., Meena Bagh, M.A. Rd.,
New Delhi – 110 001
LIST OF MEMBER OF PARLIAMENT (ST), LOKSABHA

49 To
Shri Ninong Ering, MP
92, South Avenue,
New Delhi – 110 011

50 To
Shri Takam Sanjoy, MP
8, Feroze Shah Road,
New Delhi – 110 001

51 To
Shri Mansukhbhai D. Vasava, MP
55, North Avenue,
New Delhi – 110 001

52 To
Shri Sudarshan Bhagat, MP
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New Delhi – 110 001
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New Delhi – 110 011
Tel.: 23011900 / 9868181905

03 To
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704, Brahmaputra, Dr. B.D. Marg,
New Delhi – 110 001
Tel.: 23766592 / 9868181036

04 To
Shri Thomas Sangma, MP
404, Brahmaputra, Dr. B.D. Marg,
New Delhi – 110 001
Tel.: 9868181031

05 To
Shri Lalthming Liana, MP
502, Brahmaputra, Dr. B.D. Marg,
New Delhi – 110 001
Tel.: 23766516 / 9868181842

06 To
Shri Khekiho Zhimomi, MP
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Tel.: 23753766 / 9868181040

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AB-16, Mathura Road,
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Tel.: 23782046 / 9810633817

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804, Brahmaputra, Dr. B.D. Marg,
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Tel.: 23766643

09 To
Ms. Anusuiya Uikey, MP
C-404, Swarnajayanti Sadan,
Dr. B.D. Marg, New Delhi – 110 001
Tel.: 23766646 / 23766647

10 To
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12, Talkatora Road,
New Delhi – 110 001
Tel.: 23327522 / 23320162

11 To
Shri O.T. Lepcha, MP
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New Delhi – 110 001
Tel.: 25512513 / 9868181414

12 To
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New Delhi – 110 001
Tel.: 23353199 / 9013181333
ANNEXURE -1

NATIONAL COMMISSION FOR SCHEDULED TRIBES

Comments/views of National Commission for Scheduled Tribes on the draft Land Acquisition, Rehabilitation & Resettlement Bill, 2011

1. A general law doesn't make suitable discrimination between the nature of land rights of tribals vis-à-vis other categories of landholders. Land is generally owned by the State, and held on the basis heritable tenures in most parts of the country – the concept of freehold being limited to certain urban pockets. Tribals, however, have traditionally enjoyed full ownership of land, which practice is still prevalent in the North – East. Tribal lands are also not transferrable to non-tribals – whether by sale, lease or mortgage, etc. Any law which seeks to expropriate tribal rights over land must recognize these differences; and provide appropriate and equitable circumstances as well as compensation of rights. Therefore, in order to insulate tribals from the adverse effects of development, provide equitable treatment and also to meet their needs and aspirations, there was an imperative need to include a clearly defined perspective of tribal rights in the Bill through a special chapter in respect of Scheduled Areas considering the following major factors:

(i) In SLP (Civil) 4601-02 of 1997, Samatha Vs. Govt. Of Andhra Pradesh and Ors. the Supreme Court had observed that in the light of the provisions contained in Clause a of sub-para 2 of Para 5 of Scheduled V of the Constitution, there is implied prohibition on the State's power on allotment of its land to non-tribals, in the Scheduled areas, which also limits the State's power to acquire tribal land for subsequent allotment to non-tribals whether for incidental public purposes or otherwise. Keeping in view the provisions of Schedule V and the directions in the aforesaid judgment, it would be appropriate to simultaneously legislate special provisions for acquisition of land in Scheduled Areas instead of leaving adaptation of the same entirely to the wisdom and zeal
of the Tribal Advisory Councils/ Governors of the Concerned States

(ii) Land being the primary means of production in the tribal society, acquisition of tribal land, leading to their landlessness, is both socially and economically depriving the tribals, who have limited capacity to earn their livelihood outside their habitat and pursue economic activity not involving agricultural land. Sensitivity to these tribal needs must be incorporated into legislative treatment; and only leasehold rights may be demanded from them for developmental needs rather than expropriation of ownership.

(iii) Diligent effort is essential to comprehensively identify all the environmental / displacement risks which tribals would be exposed, consequent to displacement; and to establish the overriding public interest which demands such sacrifice from them. In Scheduled Areas, therefore, ‘Public purpose’ should be determined through a participatory and transparent process incorporating additional safeguards for tribals including judicial review.,

(iv) The prevailing governance deficit requires that the availability of safeguards for Scheduled Tribes is not dependent on the mercy or alertness of Govt. functionaries, or become fodder for interpretation by legal luminaries.

2. The provisions of rehabilitation and resettlement have been integrated with the land acquisition process in the Bill. However, the Bill doesn’t explicitly include acquisition and displacement from lands acquired/purchased from tribal owners by public sector organizations (companies, corporations, boards, authorities, etc.). The Requiring body may possibly obtain some portion of its total land requirement through allotment of Govt. lands. Therefore, besides land acquired by the appropriate Govt., all other land transfers, or change in land use of agricultural / forest land for a different purpose, which will result in displacement of tribal owners / occupiers, should also be brought within the scope of the legislation.

3. However, combining provisions of rehabilitation and resettlement with land acquisition procedures in the Bill does not deny the necessity of a separate R&R
legislation as, it does not include cases of involuntary displacement of permanent nature due to disasters/natural calamity, external/internal, conflicts and diversion of forest land, etc.

4. The Bill doesn’t explicitly provide land compensation for persons having “title deeds” conferred under the ST other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, whose rights have to be foregone on account of resettlement. Besides clarifying relevant definitions, (Cl 3(r) (ii)), the Bill should specify that all land acquisition process in Scheduled Areas must be preceded by settlement of tribal rights (including community rights) under the Scheduled Tribes and other Traditional Forest dwellers (Recognition of Forest Rights) Act, 2006 (which should be kept recorded/updated) and land regularized under this Act must not be dispossessed/acquired except in the case of emergency, wherein same category of land rights must be provided. The Bill should also recognize resettlement/rehabilitation rights of share croppers etc. and other persons who derive their livelihood by providing services to land owners (especially if displacement is involved).

5. The definition of “infrastructure project” under Cl. 3(o) is too wide and ambiguous, and should be more specific in respect of Scheduled Areas, to ensure that tribals are not displaced to provide for the commercial/residential/entertainment needs of other sections of society. Therefore, purposes like mining activities, sports, tourism, projects for preservation and storage of processed agro-products and perishable agricultural commodities, housing, should be included under Clause 3 za(vii), irrespective of ideological bias. Further, Cl 3 (o)(v), which provides flexibility to include “any other project or public facility as may be notified in this regard by the Central Government” has the effect of enlarging the scope of the Act, and should not be extended to Scheduled Areas to avoid temptation to tinker with constitutional safeguards for Scheduled Tribes.
6. In Scheduled Areas, concern with tribals being primary, all other needs should be considered of secondary importance. Therefore, the need for land acquisition and displacement, even for the Govt. under strategic considerations, should be well proven/amply justified through the benefits of the project option outweighing the costs of loss of land, livelihood, shelter, habitat/culture, environment, capital and operating costs incurred and any public interest value accruing from the existing use of the land and everything attached to it.

To limit deprivation of tribal land for all other non-strategic purposes, while determining "Public purpose", the general interest of the community as opposed to the particular/commercial interest of individuals should be clearly demonstrated, and the livelihood of the tribals should also be adequately protected by providing land in lieu of land (even by purchase of private land/diversion of forest areas) in all cases. Keeping in view the limits on allotment of Govt. land to non-tribals flowing from the Samatha judgment, in Scheduled Areas, instead of general usefulness, public purpose may be restricted to developmental activities or redevelopment in the interests of area planning wherein the Govt. owns at least 51%. Even for such purposes considering current life cycles of investments, tribal land should be mortgaged/given on lease rather than transfer of ownership, with provision for continued sharing of cost appreciation/windfall gains. Since profit is their overriding consideration, PPP/privately owned projects necessarily embed tribal hazard, in that they cannot eschew temptation to substitute cheaply obtained land for more expensive capital requirements. In order to discourage circumventing of constitutional safeguards, the declaration of public purpose should also be justiciable in respect of Scheduled Areas.

7. SIAs / EIAs are necessary to provide a good substrate for resettlement planning to address/mitigate ensuing problems and also to identify all the environmental / displacement risks which tribals would be exposed to consequential to displacement; and establish the overriding public interest in Scheduled Areas (with record of specific findings on different issues to facilitate testing during
judicial review), which demands such sacrifice from them. It is possible that the quantum of land proposed to be secured will be understated (or arranged in creeping increments) to escape R&R obligations. Therefore, in Scheduled Areas, SIA (including emotional and psychological impacts) should be mandatory for all projects / land transfers / change in land use of agricultural / forest land for a different purpose which will result in the displacement of tribal owners / occupiers, irrespective of the quantum of land involved and the number of families it displaces or the voluntary / involuntary nature of the displacement. SIA should also identify affected areas (including contiguous forest lands wherein tribals have rights) and enumerate all affected (interested) persons to facilitate enquiry into objections and subsequent determination of 'public purpose'.

Projects involving land proposed to be acquired under urgency provisions are also accompanied by the same irreversible adverse effects of environmental degradation / displacement; and should not be exempted from the requirements of EIA / SIA or the need to comprehensively weigh public purpose. This is especially important for Scheduled Areas, because the regularity with which “exceptions” become a “routine” appendage of bureaucratic processes and decision-makers’ apathy obscures citizens’ miseries by fanciful interpretations of national imperatives have been amply commented upon by the Supreme Court in recent decisions on the subject. Other legislations providing for acquisition of land and/or occupation of the land under emergency in times of conflict, calamity, etc. without prior payment of compensation should also be reviewed/amended to provide rehabilitation and resettlement.

SIAs should be undertaken by the Requiring body to avoid fragmentation/dereliction of responsibility, through properly qualified multi-disciplinary teams and should also incorporate views of the affected persons and concerned elected local bodies in the Scheduled Areas. The expert group to consider SIA report should also include a representative of the displaced
families (if only as observers). Individual notices may be issued in Scheduled Areas to all persons known to have an interest in the land besides public notice, so that they may also be enabled to seek judicial determination regarding the public purpose of acquisition.

8. It is important to ensure that tribals are not dispossessed from their lands and livelihood without ensuring resettlement in advance. Therefore, implementation of the R&R plan should generally be entrusted to the Requiring body so that R&R facilities are integrally conceived with the planning of the project, and come into existence simultaneously with the process of award and payment of compensation; and certain critical elements, like infrastructure, are not staggered thereafter. Closure interaction/flexible understanding between the Requiring; Body and the affected person would mitigate the adverse effects of the project, besides reducing acquisition time/schedule of implementation of projects.

9. There is no provision in the Bill to regulate compensation in cases farmland is purchased directly by companies. Proxy purchase of tribal land by companies through subterfuge agents have been reported. Since land transfer Regulations in Scheduled Areas generally provide for transfer of tribal land only with the permission of designated authorities, the Collector (Land Acquisition) should also be tasked with certifying reasonability of sale prices (comparable with his award) before private transfers are permitted/registered.

10. In Scheduled Areas, since data regarding land transfers may be scanty, the Net Present Value (NPV) of the expected accruals from the current/future use of the land for 30 years should also be compared while arriving at the market value.

The Bill should also provide compensation in the award for forest rights which may become unavailable because of displacement and also sub-surface rights (water/minerals etc.) as Scheduled Tribes have been (and also continue to be
so in Schedule VI areas) traditional owners of land (rather than tenure holders with heritable rights to cultivate land).

Multiple uses of the land acquired must also be accounted for in the compensation. For example, if agricultural land is to be used for mining, then besides compensation for use of land surface, the future earnings from mining activity should also be shared with land owners. The current provision of 20% of land value appreciation in Schedule II of the Bill doesn’t take into account all possible situations.

Further, where land is acquired by the Govt. for projects meant for production of goods and services, compensation for land acquired has to be supplemented with (and not adjusted against) allotment of shares and debentures, as part of the long-term profit sharing of the project derivable from land as a factor of production. The quantum of such “sweat” equity must be reasonably relatable to the nature of economic activity of the project and the equity base. 50% developed land/sweat equity/share in the future profits should be provided for land owners in case of land development projects, (instead of 20% developed land as proposed in Schedule II) because land is the principal ingredient of the activity and its value continues to rise exponentially while other appurtenances depreciate.

Development costs should not be charged as part of the profit-sharing mechanism in respect of the land acquired for urbanization purposes, since such costs are open to manipulation and the quantum of 20% reserved for affected families is actually quite arbitrary.

11. In the event of the acquired land remaining unutilized, it should be returned back to the original tribal owner wherever possible, without insisting on the repayment of the compensation amount since the livelihood loss caused to the landowners may have eroded the compensation received (as is done on expiry
of a lease). In case the land is subsequently utilized by the Govt. for a different purpose (e.g. for real estate development after mining, etc.), the earnings from such activity should also be shared with the original land owners in similar fashion for appreciation in land values.

12. There is a need to specify to fix timelines for the entire process, involving land acquisition and R &R. The (maximum) period entailed in the process (from SIA upto award) is 5 years, which needs to be shortened to 3 years through larger involvement and devolution of responsibility to the Requiring body for rehabilitation planning and implementation in the interest of project implementation as well as speedy resettlement of affected persons.
NATIONAL COMMISSION FOR SCHEDULED TRIBES


Some important issues, which have still not received due attention in this version of the Bill, are as follows:-

a. In SLP (civil) 4601-02 of 1997, Samatha Vs. Govt. Of Andhra Pradesh and Ors. the Supreme Court had observed that in the light of the provisions contained in Clause a of sub-para 2 of Para 5 of Scheduled V of the Constitution, there is implied prohibition on the State’s power on allotment of its land to non-tribals in the Scheduled areas- which also limits the State’s power to acquire tribal land for subsequent allotment to non-tribals, whether for incidental public purposes or otherwise. The judgment also directed that Minerals in Scheduled Areas have to be exploited by the tribals or State instrumentalities alone. Thus, the Samatha judgement requires exclusivity in grant of mineral concessions for Scheduled Tribes or State instrumentalities, not merely according preference to them.

It is therefore, desirable that, if mineral extraction is authorized by private entities in case of the Scheduled areas, the Govt. should be willing to shoulder vicarious responsibility for providing habitat and livelihood security in such areas. The State is one of the principal beneficiaries of the mineral extraction projects, as the royalty levied by the State on minerals extracted far exceeds the rents paid by the lessee to the tribal owners. To ensure livelihood security to tribals, the State must ensure alternative land in case they will be substantially deprived of their holdings, as well as give them a due share of the profits to be derived from mining.
b. The Bill doesn’t incorporate an essential, specifically delineated provision for rehabilitation & resettlement for the project affected/displaced persons under the obligations set out in the mining lease. It maybe mentioned that the draft Land Acquisition, Rehabilitation & Resettlement Bill, 2011, which is awaiting approval of the Parliament, has integrated the provisions of rehabilitation and resettlement with the land acquisition process, but doesn’t cover R&R in respect of the project-affected/displaced persons as a result of diversion of forest land/private lands leased for mining. The R&R obligations also need to be ensured in respect of incremental leasing of adjacent areas and extension of current leases in perpetuity also, which have not been provided in the Bill. The subject is vital to the interests of Scheduled Tribes and merits a separate chapter in the Bill.

The proposed National Sustainable Development Framework Bill should have equitable R&R as an objective, with an express provision for issue of R&R guidelines laying down a standard procedure for the same. Rehabilitation and Resettlement (R&R) plans should be linked to the Mining Plan, so that R&R activities are satisfactorily completed before the lessee ceases operations in a specified area. The standard rehabilitation procedure should also be made applicable to diversion of forest land also. All forest rights must be settled as per the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 before grant of lease; and, these must not be resumed/diverted except in the case of emergencies or strategic necessity, in which case equivalent forest land should be allotted with similar rights besides other compensation admissible.

Similar to the corporate social responsibility document (Cl.26(3)), there should also be a R&R document which should document the obligation/efforts and outcomes achieved. Before granting approval for extension of a mining lease, special report regarding implementation of R&R obligation should also be sought (Cl.28(3)proviso). Besides failure or delay in commencement of mining operations (Cl.29(1)) leases should also lapse in case R&R obligations have not been
discharged. Further, R & R norms specified by the R & R law/National Sustainable Development Framework should comprise the benchmark to be followed in all cases.

c. The Bill assiduously protects the financial interests of Government by mandating lease only through competitive bidding inclusive of profit-sharing [Cl. 13(3)(g)] and also those of lessees, who are permitted to transfer the concession with attendant potential for unearned profits, but does not provide any mechanism for profit-sharing with land owners. It is to possible to link profit-sharing with land holders also with the profits distributed to the Govt. Since mining is a long-term activity, necessary provision according share to land owners in the amount of appreciation of value of lease should also be included.

Contribution to the District Mineral Fund only as a proportion of royalty excludes share from windfall profits or protection against sudden deprivation due to cessation of business. Since mineral extraction is generally destructive of soil surface, it can't usually be restored to original land use subsequently. An effective and equitable compensation arrangement should ensure lifelong annuities sufficient to substitute income deprivation for the land owners (adjusted for likely inflation), besides creating alternative vocations for them. The land owners should also get a reasonable share in the profits distributed/ retained by the mining enterprise. Besides annual compensation in lieu of land surface rights, future (and sometimes windfall) earnings from mining activity should also be shared with land rights holders in reasonable measure as has been analogously provided in the Land Acquisition and R&R Bill, 2011. Further, the land should be returned to the owners after ecological reclamation of mined areas, or future earnings shared if non-agricultural use is continued in another form. If some land rights are being ceded in perpetuity, the Commission suggests that the retained earnings from the project activity should also be shared with the land owners in the form of “sweat-equity” (beside compensation for denial of use of land surface). Share of earnings from alternative
uses of land should also be provided, if future land use is of a commercial nature. Benefits/privileges available to mineral right holders may also be accorded to ordinary landholders also in Schedule V and VI areas.

d. The proposed District Mineral Foundation (DMF) should only work like a Trust looking after the interests of affected persons and should eschew the temptation to dabble in other activities. The sanction to use DMF for creation of local infrastructure, as provided in the Bill, may progressively erode the rights/benefits directly available to affected persons, unless this proportion is limited by law to a specified minor fraction. The legitimate expenditure toward infrastructure development in Scheduled areas should be met through other sources. As evident from the conduct of functionaries/public representatives brought out in the CAG reports regarding use of MNREGA funds, etc., there should also be a provision for punishment of the members of the Governing Committee of the Foundation for diversion of funds to ineligible purposes.

2. Clause-wise comments on the Bill are enclosed.