Letter to Shri Jairam Ramesh from Dr. Urmila Pingle, Dr. Devendra Pandey and Dr. V. Suresh

19.10.2010

To:
Shri Jairam Ramesh
Minister of State for Environment and Forests (Independent Charge)
Paryavaran Bhavan
New Delhi

Sub: - Response of Majority of POSCO Enquiry Committee to Dissent Report of Meena Gupta

Dear Shri. Jairam,

The four member committee constituted to examine the merits of the environmental clearances, the forest clearances given to POSCO submitted their reports on 18.10.2010. Out of the 4 members, 3 of us Dr. Devendra Pandey, Dr. Urmila Pingle and Dr. V. Suresh gave a single report concurring on all issues. However Ms. Meena Gupta differed with the other three and gave a dissenting report. We are writing this response to you as we did not have the benefit of seeing Ms Meena Gupta's recommendations and her letter of transmittal prior to submitting our report.

We first wish to clearly state that the interpretation being made in some quarters that our report and Ms. Gupta's report are largely the same is simply incorrect. We would therefore also like to request that our reports be posted separately.

The reports differ in approach, conclusions and substance. We particularly wish to point out that the recommendations of Ms. Gupta are not in accordance with law on a number of points (explained further below):

- Her position in the letter of transmittal that the other three members were "going beyond the Committee's terms of reference when they wish to assess not merely the compliance with the clearances granted but the grant of the clearances per se" is untenable. Indeed, she contradicts herself by then looking at additional concerns rather than restricting herself to compliance with conditions (which was her interpretation of the ToR). Further, under basic administrative law, a clearance once given can certainly be revoked.
- Her recommendation that there should be further environmental impact assessments without revoking the clearance is untenable. Under law, an impact assessment is not a private exchange between Ministry and company but a basis for scrutiny by all authorities and the public. This is why we have an environmental clearance process, public hearings, etc..
- The recommendation to complete the FRA process within a time limit is in contravention of the Forest Rights Rules and an usurpation of the legal powers of the gram sabha. Ms. Gupta also seeks to override the gram sabha's power to deny consent to forest diversion, imposing her own legal interpretation over that required by law and by the Ministry itself. Such actions would encourage further manipulation.

THE LEGAL UNTENABILITY OF MS. GUPTA'S RECOMMENDATIONS

The Committee has serious reservations to the recommendations made by Ms. Gupta on the various issues as the same are not only untenable but also legally impermissible.

Scope of TOR

Ms. Meena Gupta in her letter of transmittal has stated that her concern primarily was that the other three members were "going beyond the Committee's terms of reference when they wish to assess not merely the compliance with the clearances granted but the grant of the clearances per se". This objection is curious. Admittedly work has not started at the ground level. Hence the issue of compliance with the clearances granted and the conditionalities thereof does not arise. Further if this interpretation of the TOR set out by Ms. Meena is accepted then her own recommendations such as carrying out comprehensive EIA and looking into additional concerns such as water, rights of fishing community and so on are clearly going beyond her own interpretation of the scope of the TOR. This lacks consistency.

She makes this argument by steadfastly ignoring the term of reference referring to compliance with statutory requirements (point iv), and in fact leaves out that term entirely in her listing of the Committee's TORs (p. 10 of her report).

Her contention in her Report that the clearances already granted can only be set aside by an appellate authority as otherwise it would imply that no clearance given to any project is final is a misconception in law. We would like to point out that finality of decision is only applicable to the judicial process where a judgement even if wrong becomes final as between parties and cannot be rectified at a later date. However in respect of executive / administrative clearances it is the inherent power of any authority to revoke the approvals / clearances if there is material to show that there is a suppression of facts or gross illegalities in the process. In fact it is a conditionality imposed on all clearances.

Hence the argument that the clearances have reached a finality and hence the Committee is foreclosed from looking into the clearances lacks any legal basis.

Recommendation for Post facto preparation of Comprehensive EIA

The report of Ms. Gupta records that there are a "number of issues relating to EC and CRZ which need to be looked at afresh. The MoEF should consider doing this at the earliest by requiring a comprehensive EIA to be prepared both for the steel plant and for the port and ask the EAC to examine various aspects so that additional conditions if required can be imposed on the project before construction starts".

We would like to point out that the preparation of EIA has a time and place in the scheme of things in the EIA notification. According to the EIA notification, a comprehensive EIA is the basis on which the public consultation and hearing should be done. Hence a post clearance Comprehensive EIA defeats the very purpose of the Public Consultation process under the EIA Notification. If at all a comprehensive EIA is undertaken by the project proponent a fresh public hearing is mandatory. Hence her recommendation to conduct a post clearance Comprehensive EIA is clearly in violation of procedure prescribed in the notification and hence in violation of the law.

Recommendation to complete FRA Process within a time limit and overriding of gram sabha consent

Ms. Meena Gupta accepts that the FRA process has "suffered from shortcomings and inadequacies". She has recommended that the recognition process should be completed within a period of 3 months and no extension of time beyond three months should be permitted to receive the claims. She has acknowledged that Rule 11(1)(a) of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007 permits extension of time if necessary. Rule 11(1)(b) as regards claims to community rights stipulates that a date has to be fixed and there is no provision for extension of the period.

We would like to point out that the proviso to Rule 11(1) (a) referred above provides that the Gram Sabha may if considered necessary, "extend such period of 3 months after recording the reasons thereof in writing". Thus it is very evident that statute confers the discretionary power to extend time for processing of claims under the FRA Act to the gram

Sabha and no Committee can place any embargo on the exercise of this right conferred on the gram Sabha. Further Rule 11(1)(b) of the Rules does not fix a date for receiving the claims. It merely stipulates that a date should be fixed for ***initiating*** the process of determination of its community forest resource and intimate the same to the adjoining Gram Sabhas. Thus the interpretation given by Ms. Meena Gupta that Rule 11(1)(b) does not provide for extension of time is not correct.

Hence we are of the strong opinion that the recommendation that the recognition process should be completed within a period of 3 months and no extension of time beyond three months should be permitted to receive the claims is legally impermissible and would amount to usurping the discretionary powers statutorily vested in the Gram Sabha.

We finally wish to note that Ms. Gupta also seeks to override the legal requirement for the consent of the Gram Sabha by various legal contortions (page 13 of her report), imposing her own interpretation over that required by law and by the Ministry's own order of August 3rd, 2009.

Vedanta Vs. POSCO

We would like to point out that the painstaking reference to the differences between the POSCO and Vedanta projects is a trifle surprising. Ms. Gupta in her report pointed out that Vedanta was in respect of mining in a scheduled area and that STs enjoy an important constitutional status whereas POSCO deals with displacement of Scheduled Castes and fishing community and agriculturists. She also points out that while in Vedanta construction has started in POSCO the project is yet to start.

We would like to emphasise that this distinction is without a difference. In fact it is discriminatory. Both POSCO and Vedanta are alike in the sense that in both instances there is gross violations of law with impunity. It is indeed strange to say that the rule of law should be followed only for tribals and if the project is already underway, but the same can be overlooked and condoned if the project affected are the Scheduled Castes (SCs) and fishing community who according to us are also equally vulnerable and exploited sections of society.

It is most unfortunate that the interests of the two most vulnerable sections of our society - SCs and STs - are being pitted against each other in order to favour corporate interests. Hence we are of the opinion that all violations should be dealt with a heavy hand equally and attempts to put forward hairsplitting differences where there are none is a diversionary tactic.

We request you to make this letter public.

Sincerely,

Dr. Urmila Pingle
Dr. Devendra Pandey
Dr. V. Suresh