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INFOGRAPHIC

COULD A UN TREATY MAKE TRANSNATIONAL CORPORATIONS ACCOUNTABLE?

THE CASE OF THE POSCO-INDIA PROJECT



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This infographic summarizes a detailed legal analysis of the POSCO-India Project, available at: www.fian.org

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INTRODUCTION

Pohang Iron and Steel Enterprise (POSCO), a South Korean multinational corporation and one of the world’s largest steel producers, sought in 2005 to establish an integrated steel venture in Jagatsinghpur district, in India’s eastern state of Odisha (formerly known as Orissa). Operating through its wholly-owned subsidiary POSCOIndia Pvt. (POSCOIndia), the company planned to open iron ore mines, a steel processing plant, a captive port facility and related transportation and water infrastructure, all of which amounted to over 12,000 acres of land. A Committee constituted by the Ministry of Environment and Forests (MoEF) concluded that the acquisition of land for the project would destroy local residents’ livelihoods and result in the effective displacement (physical or economic) of the area’s 22,000 inhabitants.

The government of Odisha entered into a Memorandum of Understanding (MoU) with POSCO in June 2005. As part of the agreement, the government promised to offer 4,004 acres of coastal land to the company, even though thousands of traditional forest-dwelling communities lived on or used this land and had not participated in

the discussions, let alone given their consent, for such development. Despite the magnitude of the project and its potential impacts, the project was allowed to proceed without properly consulting those who stood to be affected and bypassing legal protections.

The measures of reparation offered to project-affected communities were insufficient to compensate the full spectrum of harms and ignored the particular circumstances and needs of certain project-affected groups. India failed to adhere to international standards protecting people from forced evictions and ensuring the provision of adequate alternative housing, land and/or compensation for all losses.

The POSCO-India project faced strong opposition from the outset. In August 2005, grassroots resistance to the project organised into the POSCO Pratirodh Sangram Samiti (Anti-POSCO People’s Movement or “PPSS”). India responded to peaceful opposition by restricting the movement of villagers, engaging in violence and arbitrarily arresting those resisting the project. The project also generated conflict between villagers

who supported the project and those who did not, creating tension within communities which often resulted in serious incidents.

As ‘home State’ of POSCO, South Korea failed to provide remedy to project-affected individuals who sought remediation through the country’s OECD National Contact Point (NCP). The South Korean NCP rejected the case by explaining that the allegations concerned the legality of activities of the Odisha government over which it deemed to have no say.

In 2017, faced with ongoing public resistance and regulatory hurdles, POSCOIndia handed back to the government the land that it had already acquired and withdrew from the project. However, in September 2018, the state government illegally handed over the acquired land to another steel company, JSW Utkal Steel Ltd (JUSL), for the same purpose of setting up the steel plant.

This is despite the fact that under applicable law, the land had to be returned to its original owners. As of December 2019, the land has not been returned to the original inhabitants. In fact, pressure on villagers to give up their land has continued to this day.

This infographic aims to analyse the second revised draft of the legally binding instrument on transnational corporations and other business enterprises with respect to human rights in light of the POSCO case. It aims at highlighting how the second revised draft would serve this case or what additional provisions would need to be added.



PRASHANTH VISHWANATHAN/BLOOMBERG

PREVENTION



INVESTMENT AGREEMENT

The government of Odisha entered into a Memorandum of Understanding (MoU) with POSCO in June 2005. As part of the agreement, the government promised to offer 4,004 acres of coastal land to the company, even though thousands of traditional forest-dwelling communities lived on or used this land and had not given their consent for such development.

State authorities advanced corporate interests in a typical example of foreign direct investment trumping the protection of human rights. The **Preamble** and **Art. 14** should clearly state that in the event of a conflict between the obligations of the States Parties under the present legally binding instrument and their obligations under trade and investment agreements, their obligations to respect and protect human rights in the context of business activities shall prevail. **Art. 14 (a) and (b)** should be retained.





IGNORING LEGAL REQUIREMENTS FOR FPIC AND EIAs

Invoking their rights under the Forest Rights Act, forest-dwelling communities denied permission for any land to be diverted for the POSCO-India project. Both POSCOIndia and the Odisha government disputed the applicability of the Forest Rights Act, despite government officials from the MoEF and Ministry of Tribal Affairs confirming the villagers' status as traditional forest dwellers protected under the Forest Rights Act after a visit to the area in 2010. The project forest clearance was nevertheless approved and never revoked despite a MoEF investigatory committee finding its illegality.

As per its MoU with POSCO, the government of Odisha agreed to "facilitate" **environmental clearances** for the project and required POSCOIndia to conduct "rapid" EIAs which received clearances by the MoEF. India's National Green Tribunal ordered their suspension, however, efforts to clear trees and acquire land in the proposed plant area continued despite the tribunal's findings.

State authorities breached existing laws, court orders and official findings to acquire land for the steel project.

Art. 6 should not only focus on business due diligence but include a specific provision on the State obligation to respect human rights in the context of business activities, including when delivering licenses, permits or clearances.

Art. 6.7 should be strengthened so that measures to limit the influence of commercial and other vested interests of business enterprises apply not only to policies, but also to laws, regulations, administrative procedures and public institutions.

Add specific provisions under **Art. 6** on the State obligation to respect rights of individuals and local communities, including peasants, to participate in decision-making concerning business activities likely to impact their human rights, to be meaningfully consulted and to have timely access to all relevant information concerning these activities.



CONSULTATIONS

One single hearing took place in 2007, two years after the signing of the MoU and one year after the conclusion of the required environmental impact assessment for the project. It took place 15km away from the affected area and authorities had deployed paramilitary forces in the area, creating an intimidating environment.



PROTECTION OF HUMAN RIGHTS DEFENDERS



Indian law enforcement responded violently to the multiple protests and peaceful resistance that villagers orchestrated over the years to oppose the project or demand consultation. Police brutality included beating protesters, firing tear gas, rubber bullets and metal pellets upon them, often causing serious injury, denying assistance to seek medical care for injured protesters and destroying property such as houses, shops, betel vine and motorcycles.



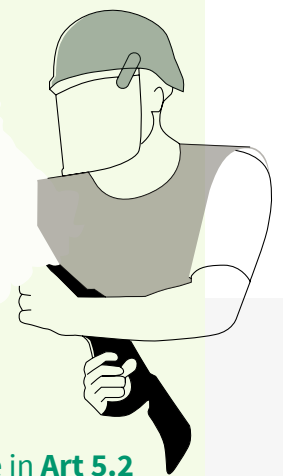
Move provisions on human rights defenders currently in **Art 5.2** on Protection of Victims to **Art 6** on Prevention to recognise the critical role that human rights defenders play in the effective protection of human rights before abuses or violations have been committed and to avoid referring to them as victims.

Retain provisions under **Art 8.1** on a comprehensive and adequate system of legal liability of business enterprises, but add language to make clear that the basis for such liability is either “causing” or “contributing” to human rights violations or abuses. This is to ensure that instances of corporate complicity (such as actively requesting or knowingly benefiting from attacks on human rights defenders as discussed in this case) are properly captured.



Odisha’s government used false criminal charges and arrests as tools to suppress protest against the POSCO-India project, targeting especially opposition leaders. Charges were often laid without any previous police investigation and led to many arbitrary arrests on little or no evidence.

Retain the current language in **Art 5.2** on human rights defenders but add explicit reference to protection from criminalisation and arbitrary arrest given the frequency of their occurrence.



REMEDIES



Individuals and families displaced or affected by the development project were entitled by law to preferential consideration for employment in the project. However, only one family member could be nominated to access this benefit. There is no requirement to provide land of the same size and quality of that which was lost. Families who only lose agricultural land are not entitled to any alternative land at all. Those who are not employed in the project and certain families who lose homestead land are eligible for a one-time cash pay-out.

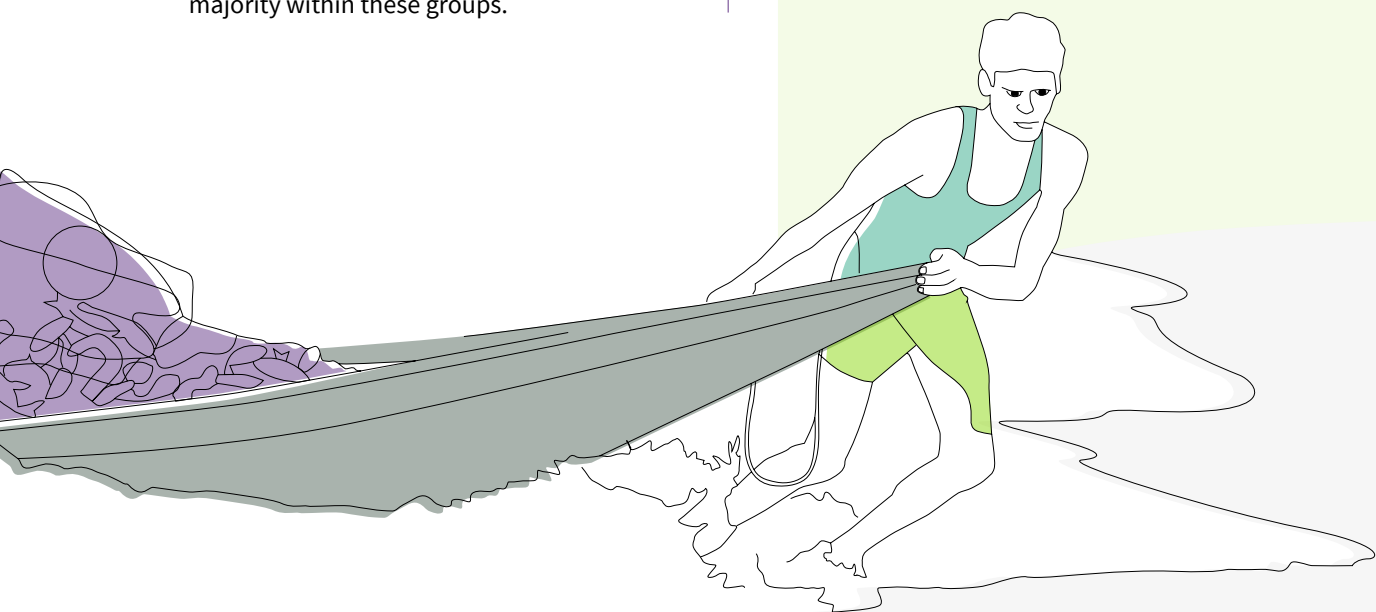
Some affected people were excluded from the compensation package entirely. Fisherfolk and landless agricultural labourers not involved in betel cultivation were not included in the list of affected people. As a consequence, these groups were not eligible for compensation despite the fact that they stood to lose access to lands and resources that served as their sole source of income and, in many cases, food.

Offer of employment as way of compensation disadvantaged women who are mostly labourers on agricultural land or betel vine cultivation. Dalits were also disproportionately affected by the compensatory regime, as no compensation was offered to landless labourers not engaged in betel cultivation and Dalits tend to represent the majority within these groups.

Retain the language of “adequate, prompt, effective and gender-responsive” reparations now used in **Art 8.5** and consider adding “full” (as provided for in Principle 18 of the UN Basic Principles on the Right to Remedy) to emphasise the need for reparations to be comprehensive and cover all, and not only a limited number of harms.

Retain the language of “non-discriminatory access to justice and effective remedy” in **Art 4.2(c)**, which is particularly useful to avoid the arbitrary exclusion of people from reparation measures.

Establish the principle that reparation measures must take into account and respond to the differentiated impacts, including future impacts, which corporate activities have on different groups of people and be tailored to their particular needs. This could be inserted as a stand-alone provision under **Art 4** on the Right of Victims or **Art 8.5** which addresses the state obligation to ensure effective reparations.



THE 'HOME STATE' OBLIGATIONS



South Korea did not have any legislation or mechanism in place to require Posco to ensure its fully-owned subsidiary POSCOIndia respected human rights in its operations in India during the lifespan of the Posco-India project.

Complaints against POSCO and two of its foreign investors, Dutch Pension Fund ABP (and its pension administrator APG) and Norwegian Bank Investment Management (NBIM), were simultaneously filed with the South Korean, Dutch and Norwegian NCPs. Although both the Dutch and Norwegian NCPs accepted the case, South Korea's NCP did not.

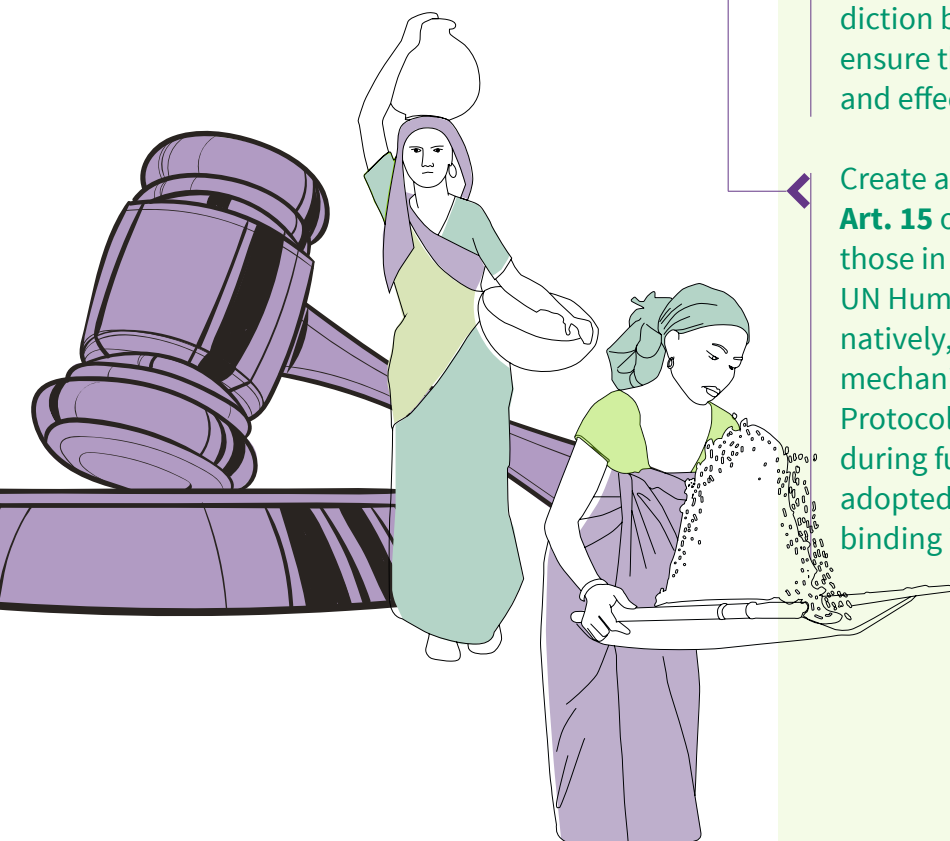
Although the Dutch complaint secured commitments with a potential to improve the situation on the ground, the Norwegian case demonstrates the limited value from the point of view of effective remedy of certain State-based Non-Judicial mechanisms that do not have powers to compel participation, sanction non-compliance and issue binding recommendations.

Retain provisions in **Art 6.1** concerning the obligation of the home State to impose on companies a duty to respect human rights and prevent human rights abuses throughout their operations. Add "global" to the phrase "throughout their operations" (i.e. "throughout their global operations") to make absolutely clear that these duties extend to activities outside the territory of the home state.

Amend the definition of "business relationship" under **Art 1.5** to ensure all entities in a company's value chain are covered by the concept, including clients and investee companies in financing relationships which are currently absent from the definition.

Add "independent" and "effective" to the reference to non-judicial mechanisms of the State Parties in **Art 4.2(d)**. Also add "powers" following the reference to "necessary jurisdiction" in **Art 7.1** to ensure courts and state-based non-judicial mechanisms not only have jurisdiction but also the necessary powers to ensure they can offer "adequate, timely and effective remedy".

Create a complaints mechanism under **Art. 15** on Institutional Arrangements as those in operation under other UN Human Rights Treaty Bodies. Alternatively, discuss the creation of such mechanism under the draft Optional Protocol, which should be debated during future OEIGWG sessions and adopted simultaneously with the legally binding instrument.





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