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LEGAL ANALYSIS

# 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](http://www.fian.org)

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## **ACRONYMS**

### **EIA**

Environmental Impact Assessment

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### **FPIC**

Free Prior and Informed Consent

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### **IDCO**

Infrastructure Development Corporation  
of Odisha

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### **JUSL**

JSW Utkal Steel Ltd

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### **MOEFF**

Ministry of Environment and Forests

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### **MOU**

Memorandum of Understanding

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### **NBIM**

Norwegian Bank Investment Management

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### **NCP**

National Contact Point

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### **POSCO**

Pohang Iron and Steel Enterprise

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### **PPSS**

Anti POSCO and Anti Jindal Movement

# LESSONS FROM THE POSCO-INDIA PROJECT FOR A STRENGTHENED TREATY ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS

## THE PROJECT AND ITS PROJECTED IMPACTS

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.

**The local population:** The proposed plant and port were expected to affect around 22,000 people residing in eight villages across the three gram panchayats (local governance structures) of Dhinkia, Nuagaon, and Gadakujanga. Of the 4,004 acres of land required for the steel plant and port, about 90% was government land (most of which was forest land) and 10% was private land.<sup>1</sup> The majority of this land was occupied and/or used by traditional forest-dwelling communities who had been cultivating betel leaf and rice paddies, growing cashews, operating shrimp farms, tending fruit and vegetable gardens, gathering forest produce, fishing and practicing animal husbandry for generations.<sup>2</sup> Reports also

indicate the presence of members of scheduled castes, scheduled tribes and other traditional forest dwellers in the proposed POSCO project area, who under Indian law hold forest rights.<sup>3</sup>

**Displacement and loss of livelihoods:** A POSCOIndia-commissioned socio-economic study released in January 2008 revealed that 3,578 families from seven villages would lose land, with at least 718 of them at risk of losing their homes.<sup>4</sup> Many of those at risk of displacement were peasants who, despite having cultivated plots of land for generations, did not possess formal title to the land.<sup>5</sup> A Committee constituted by the Ministry of Environment and Forests (MoEF) to enquire into the status of implementation of legal frameworks and review clearances, 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.<sup>6</sup>

1 | International Human Rights Clinic and ESCR-Net, "The Price of Steel: Human Rights and Forced Evictions in the POSCO-India Project", New York, NYU School of Law, 2013 (from now on, "The Price of Steel"), p. 11.

2 | The Price of Steel, p. 12. Majority Report of the Committee Constituted to Investigate into the Proposal submitted by POSCO India Pvt. Limited for Establishment of an Integrated Steel Plant and Captive Port in Jagatsinghpur District, Orissa (18 October 2010), [http://www.indiaenvironmentportal.org.in/files/POSCO\\_Enquiry\\_Committee\\_Report\[1\].pdf](http://www.indiaenvironmentportal.org.in/files/POSCO_Enquiry_Committee_Report[1].pdf), particularly Part A, IV.7 and Part C.

3 | Majority Report of the Committee Constituted to Investigate into the Proposal submitted by POSCO India Pvt. Limited for Establishment of an Integrated Steel Plant and Captive Port in Jagatsinghpur District, Orissa (18 October 2010), [http://www.indiaenvironmentportal.org.in/files/POSCO\\_Enquiry\\_Committee\\_Report\[1\].pdf](http://www.indiaenvironmentportal.org.in/files/POSCO_Enquiry_Committee_Report[1].pdf).

4 | The study was commissioned by POSCOIndia to the Xavier Institute of Management, a business school based in Bhubaneswar. It was required under Orissa's 2006 Resettlement and Rehabilitation Policy and its scope was limited to assessing the number of families facing displacement, their demographic profile, occupational status, income and ownership of assets, among other details. Majority Report of the Committee Constituted to Investigate into the Proposal submitted by POSCO India Pvt. Limited for Establishment of an Integrated Steel Plant and Captive Port in Jagatsinghpur District, Orissa (18 October 2010), [http://www.indiaenvironmentportal.org.in/files/POSCO\\_Enquiry\\_Committee\\_Report\[1\].pdf](http://www.indiaenvironmentportal.org.in/files/POSCO_Enquiry_Committee_Report[1].pdf), Section 2, para 29 and Section 4, para 6.

5 | The Price of Steel, p. 12-13.

6 | Majority Report of the Committee Constituted to Investigate into the proposal submitted by POSCO India Pvt. Limited for establishment of an Integrated Steel Plant and Captive Port in Jagatsinghpur District, Orissa (18 October 2010), particularly, Section 2, Parts C and D, [http://www.indiaenvironmentportal.org.in/files/POSCO\\_Enquiry\\_Committee\\_Report\[1\].pdf](http://www.indiaenvironmentportal.org.in/files/POSCO_Enquiry_Committee_Report[1].pdf) While this case study focuses on the negative human rights impacts of the plant and port on or near the coast, thousands more stood to be affected by the proposed mine in Odisha's Khandadhar Hills, particularly the Khandadhar forest's Paudi Bhuiyans, a tribal group that sustains itself from the forest. See The Price of Steel, p. 12.



### **Concerns over water and the environment:**

Given the unique natural features of the area, the construction of the proposed plant and port gave rise to significant concerns related to the diversion of the local water supply, deforestation, impact on endangered species and on coastal sand dunes, which act as storm barriers sheltering coastal villages.<sup>7</sup>

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7 | POSCOIndia received approval from Odisha's Department of Water Resources for the daily withdrawal of 10 million gallons of water from sources that supply drinking water to the cities of Cuttack and Bhubaneswar, and irrigation water to the four districts of Cuttack, Jagatsinghpur, Kendrapada, and Khurda. The Price of Steel, p. 15. In a joint statement with other UN experts, UN Special Rapporteur on Water and Sanitation, Catarina de Albuquerque, raised concerns about the large volumes of water that the project would require on a daily basis, and highlighted the need to prioritise residents' access to safe drinking water and sanitation ahead of the water required for the project. 'India: Urgent call to halt Odisha mega-steel project amid serious human rights concerns', [https://sr-watersanitation.ohchr.org/en/Press-release\\_India.html](https://sr-watersanitation.ohchr.org/en/Press-release_India.html).

### **A HISTORY OF ILLEGALITIES**

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.

### **Protection under the Forest Rights Act and EIA Notification:**

India's Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 ("Forest Rights Act") protects communities' land rights in forested areas. The Act protects forest-dwelling communities' customary land rights, including their rights to live, use and protect the forest land.<sup>8</sup> Section 4(5) of the Act establishes that it is illegal to evict any traditional forest dweller until all forest rights claims have been fully adjudicated. Once forest rights have been formally recognized, Section 5 gives the local community (through their governing bodies or "Gram Sabhas") significant rights and responsibilities for land conservation and management. These include the right to give consent via Gram Sabha resolutions before any project diverting protected forest resources can go ahead.<sup>9</sup> The Environmental Impact Assessment Notification of 2006 ("EIA Notification, 2006") requires an impact assessment of projects in order to measure their likely social, environmental and ecological impacts. Section 7 of this Notification lays down the four stages of the environmental clearance process, namely: screening, scoping, public consultation and appraisal.

**Planning behind the scenes:** The government of Odisha entered into a Memorandum of Understanding (MoU) with POSCO in June 2005. As

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8 | Forest Rights Act s 3(1).

9 | Although there are certain exceptional circumstances in which the government is allowed under Section 3(2) of the Act to use forest land for specific "public use diversions", the affected villages must still recommend the project. In addition, there is no evidence available that suggests that these exceptions applied to land confiscated for the POSCO-India project. The Price of Steel, p. 22-23.

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.<sup>10</sup> The state government also promised to facilitate “all environmental approvals and forest clearances from the Central Government within the minimum possible time for the project.”<sup>11</sup> The local villagers stated that they only learned about the project when POSCO employees started physically conducting surveys in the area in January 2005.<sup>12</sup>

**Appearance of consultation:** 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 (EIA) for the project (see below). Government officials decided to hold the hearing in Kujanga, a town over 15km away from the affected area. This made it difficult for many people to participate, as attending the hearing would entail losing a day’s worth of pay. In addition, as the hearing date approached, authorities deployed paramilitary forces in the area, creating an intimidating environment. Very few people from the affected area were actually present during the hearing. The hearing itself was hostile, with supporters of the project allegedly verbally and physically assaulting those who raised objections. The potential social impacts of the project were not discussed.<sup>13</sup>

**Ignoring the legal requirement for free and informed consent:** In April 2008, invoking their rights under the Forest Rights Act,

forest-dwelling communities passed resolutions denying permission for any land to be diverted for the POSCO-India project. Both POSCO India and the Odisha government disputed the applicability of the Forest Rights Act. The Odisha government denied that there were traditional forest dwellers in the affected area. They maintained this position 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.<sup>14</sup>

Despite the lack of consent, the MoEF granted the project forest clearance approval in June 2007.<sup>15</sup> However, in 2010, the majority of a special MoEF investigatory committee found that the grant of forest clearance had been illegal and in direct violation of both the Forest Rights Act and the Forest (Conservation) Act.<sup>16</sup> Nevertheless, the clearance was never formally revoked, in spite of this finding and the clear opposition from local communities. Faced with ongoing attempts to forcibly acquire land, the villages passed new resolutions over the next few years reaffirming their refusal to allow lands to be diverted for the POSCO-India project.

**An expedited environmental clearance process:** As per its MoU with Posco, the government of Odisha agreed to “facilitate” environmental clearances for the project.<sup>17</sup> According to

<sup>10</sup> | Priya Ranjan Sahu, “As Posco exits steel project, Odisha is left with thousands of felled trees and lost livelihoods”, Scroll.in, 22 March 2017, <https://scroll.in/article/832463/as-posco-exits-steel-project-odisha-is-left-with-thousands-of-felled-trees-and-broken-job-promises>.

<sup>11</sup> | The Price of Steel, p. 11.

<sup>12</sup> | The Price of Steel, p. 28.

<sup>13</sup> | The Price of Steel, p. 28-29.

<sup>14</sup> | The Price of Steel, p. 30-31.

<sup>15</sup> | The Price of Steel, p. 16.

<sup>16</sup> | Majority Report of the Committee Constituted to Investigate into the Proposal submitted by POSCO India Pvt. Limited for Establishment of an Integrated Steel Plant and Captive Port in Jagatsinghpur District, Orissa (18 October 2010), [http://www.indiaenvironmentportal.org.in/files/POSCO\\_Enquiry\\_Committee\\_Report\[1\].pdf](http://www.indiaenvironmentportal.org.in/files/POSCO_Enquiry_Committee_Report[1].pdf). Two other official committee reports highlighted the blatant disregard for Gram Sabha resolutions and other statutory rights under the Forest Rights Act by the State Government. See Report of the National Committee on Forest Rights Act (December 2010), [http://www.indiaenvironmentportal.org.in/files/file/Final%20Report\\_MoEF\\_FRA%20Committee%20report\\_Dec%202010.pdf](http://www.indiaenvironmentportal.org.in/files/file/Final%20Report_MoEF_FRA%20Committee%20report_Dec%202010.pdf), p. 104-105 and Forest Advisory Committee report as reported in the news: FAC advises environment ministry to reject forest nod to Posco (3 November 2010), <https://www.livemint.com/Politics/Xn00A4brWnaCgPTrLRrk/FAC-advises-environment-ministry-to-rejectforest-nod-to-Pos.html>

<sup>17</sup> | The Price of Steel, p. 29.

the Environment Support Group, POSCO India “delinked” the proposed mine area from the plant and port area to present what appeared to be smaller projects and obtain environmental clearances more easily. As a result, Odisha authorities required POSCO India to conduct “rapid” EIAs for the plant and port, rather than the comprehensive EIA that would have been required to assess the environmental impacts of the entire project.<sup>18</sup> Despite written appeals to the MoEF objecting the rapid EIAs, these were concluded in 2006 and 2007 and led to the MoEF granting environmental clearances for both the plant and port.<sup>19</sup> Potentially affected communities were not consulted in the process of elaborating the rapid EIAs.

### Intervention by the National Green Tribunal:

In March 2012, India’s National Green Tribunal, a specialized body set up to handle environmental disputes, suspended the final MoEF order (issued in 2011, adding conditions to the original 2007 clearances) for the plant and port, because it had been based on the wrong type of impact assessment. The Tribunal also noted serious inaccuracies in the rapid EIA such as the claim that zero waste would be generated, when the project would in fact discharge over 47 cubic meters of waste water per hour into the sea. Additionally, it expressed concern at the large amount of water that would be diverted from the water supplies of nearby populated areas. The Tribunal also noted the lack of comprehensive scientific data on impacts in light of the magnitude of the project.<sup>20</sup> Despite the Tribunal’s findings, efforts to clear trees and acquire land in the proposed plant area continued. In February 2013, government officials and police entered Dinkia

and Govindpur villages and begun clearing land by removing betel plantations and cutting down trees.<sup>21</sup> This prompted the Tribunal to issue a new order to stop tree felling in May 2013.<sup>22</sup>

**Alternative project sites:** the Odisha government explored at least one possible alternative site for the plant and port located 10 km away from the selected site. However, it apparently rejected it because of environmental concerns and because Posco “finds the present site to be most appropriate and is not willing to shift because of access to Port base.”<sup>23</sup> Over the years, a number of political opposition parties suggested that the steel plant might be located in alternative sites, but these sites were never described with precision and it is not clear whether the government ever seriously considered them.<sup>24</sup>

In 2012, a MoEF Committee issued a report indicating that the Infrastructure Development Corporation of Odisha (IDCO) had decided to reduce the project area to 2,700 acres by excluding most of the private land in Govindpur and Dinkia villages as well as forest land under betel cultivation in those villages.<sup>25</sup> This was allegedly done with the purpose of mitigating the overall impact of the project by reducing the amount of land required.<sup>26</sup>

<sup>18</sup> | The Price of Steel, p. 15 and 29. Posco was only required to consider the potential impact posed by “Phase One” of the project (i.e., 4 million tons per year instead of the planned 12 million tons per year which the project would reach when operating at full capacity), The Price of Steel, p. 32.

<sup>19</sup> | The Price of Steel, p. 15-16.

<sup>20</sup> | *Praffula Samantra vs Union of India and Others* (30 March, 2012), <https://indiankanoon.org/doc/106573119/>.

<sup>21</sup> | Ashis Senapati and Ashok Pradhan, “Odisha resumes land acquisition for Posco plant”, Times of India, 4 February 2013, <http://timesofindia.indiatimes.com/city/bhubaneswar/Odisha-resumes-land-acquisition-for-Poscoplant/articleshow/18326906.cms>. Efforts to take possession of land took place in two phases – in 2011 and 2013. In 2011, residents of Nuagaon agreed to give up their land in exchange for compensation. Firm resistance in other villages forced officials to abandon the land acquisition process until a new attempt in February 2013. Priya Ranjan Sahu, “As Posco exits steel project, Odisha is left with thousands of felled trees and lost livelihoods”, Scroll.in, 22 March 2017, <https://scroll.in/article/832463/as-posco-exits-steel-project-odisha-is-left-with-thousands-of-felled-trees-and-broken-job-promises>. See also *The Price of Steel*, p. 39.

<sup>22</sup> | *The Price of Steel*, p. 16 and 32.

<sup>23</sup> | Sumit Chakravarty et al, Report by the Independent Fact-Finding team on Issues related to the proposed POSCO project in Jagatsinghpur (Orissa) 19 to 22 April 2007.

<sup>24</sup> | *The Price of Steel*, p. 27.

<sup>25</sup> | *The Price of Steel*, p. 28.

<sup>26</sup> | Samantha Balaton-Chrimes, *Posco’s Odisha Project: OECD National Contact Point Complaints and a Decade of Resistance* (May 2017), <https://www.oecdwatch.org/wp-content/uploads/sites/8/2017/05/Poscos-Odisha-Project-2.pdf>, p. 14.

**New company, new illegalities:** In 2017, faced with ongoing public resistance and regulatory hurdles,<sup>27</sup> POSCOIndia handed back to the government the land that it had already acquired and withdrew from the project.<sup>28</sup> The local communities and human rights advocates around the world celebrated what they thought was the definitive suspension of the POSCO-India Project.<sup>29</sup> 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.<sup>30</sup> As of December 2019, the land has not been returned to the original inhabitants.<sup>31</sup> In fact, pressure on villagers to give up their land has continued to this day. Taking advantage of the national lockdown imposed early last year, the district administration was, reportedly, convincing and pressurizing farmers to vacate their lands, take compensation and

allow the new company to proceed. Villagers in the Panchayats of Dhinkia, Nuagaon and Gada-Kujanga were asked to sign statements (with their names, addresses and the area of land under betel leaf cultivation) consenting to eviction from their lands in lieu of monetary compensation. Shockingly, this came in response to the villagers' demand for a relief package for betel leaf vineyard owners adversely impacted by the covid-19 lockdown and a super cyclone<sup>32</sup>.

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27 | It is alleged that part of its decision had to do with a now less convenient regulatory setup. Whereas Posco had initially been promised support to obtain the mining licence, a 2015 amendment to the Mine and Minerals Development and Regulation Act now required the company (as any other mining company) to participate in an auction to get its captive iron ore mine. Priya Ranjan Sahu, "As Posco exits steel project, Odisha is left with thousands of felled trees and lost livelihoods", Scroll.in, 22 March 2017, <https://scroll.in/article/832463/as-posco-exits-steel-project-odisha-is-left-with-thousands-of-felled-trees-and-broken-job-promises>. See also <https://economictimes.indiatimes.com/industry/indl-goods/svs/steel/south-koreas-posco-suspends-planned-12-bn-odisha-steel-project/articleshow/48101950.cms>.

28 | The state-owned IIDC had by now acquired 2,700 acres of land, approximately 1,700 of which had already been handed over to Posco. On its withdrawal decision, Posco returned the land that it had acquired up until this point. Priya Ranjan Sahu, "As Posco exits steel project, Odisha is left with thousands of felled trees and lost livelihoods", Scroll.in, 22 March 2017, <https://scroll.in/article/832463/as-posco-exits-steel-project-odisha-is-left-with-thousands-of-felled-trees-and-broken-job-promises>. See also <https://economictimes.indiatimes.com/industry/indl-goods/svs/steel/odisha-cancels-land-allotment-to-posco-project/articleshow/58436653.cms>.

29 | <https://www.escr-net.org/news/2017/victory-over-global-steel-giant-farmers-social-movement-india>.

30 | Under Section 101 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (LARR) of 2013, "Land acquired and possession taken over but not utilized within a period of five years from the date of possession shall be returned to the original owner or owners or their legal heirs or to the Land Bank of the appropriate government."

31 | FIAN International, Corporate Takeover Proceeds despite Illegalities (19 December 2019), <https://fian.org/en/news/article/corporate-takeover-proceeds-despite-illegalities-2270>.

32 | <https://www.groundxero.in/2020/05/29/odisha-government-conspiring-to-grab-land-for-jsw-utkal-project/>.



## LESSONS FOR THE TREATY

State authorities pushed through their plans to forcefully acquire land for the steel project in clear breach of existing laws, court orders and official findings. Not only did state authorities fail to abide by existing laws, but they intentionally and repeatedly violated legal protections to advance corporate interests in a typical example of foreign direct investment trumping the protection of human rights. These acts and omissions also contradict many of India's international commitments on the protection of the environment.<sup>33</sup> Even the MoEF, whose main responsibility is to protect the environment through its licensing power, approved the project despite its many irregularities. The case highlights the need for the treaty to reiterate the primacy of human rights over investment agreements and to develop provisions not only in relation to the State obligation to protect human rights from the harmful activities of business enterprises, but also to respect human rights by making sure it does not violate human rights through its own actions. The case also serves to demonstrate the degree of influence and grip that powerful companies often have over state institutions and justify the introduction in the draft treaty of more comprehensive provisions on corporate capture, undue corporate influence and conflicts of interest

Not only did communities not participate in any meaningful consultation about the

project, but they did not even know about it until the company started physically operating in the area. Their views were not sought in the process of elaborating the required impact assessments either, disregarding a key, if not the most important source of information for any impact assessment genuinely intended to identify risks and prevent harm. The only meeting to seek community input took place too late to stand any chance of influencing the course of the project and was marred with irregularities, as described above. Besides, although efforts were apparently made to reduce the amount of land required for the project (as per IDCO's 2012 design) and therefore "mitigate" its impacts, the project still put the human right of thousands of people at risk. As such, it was an unfit alternative to measures which could have prevented harm altogether such as changing site location. In sum, the project advanced in violation of international standards and national laws dictating that forest-dwelling communities provide their FPIC before, and as a condition for, the approval of the POSCO-India Project.

<sup>33</sup> | For example, under the Convention on Biological Diversity, Paris Agreement on Climate Change and the 2030 Sustainable Development Goals (SDG). See Letter from Fian International to India's Ministry of Environment, Forests and Climate Change (MoEFCC) of June 2020, [https://fian.org/files/files/Open\\_letter\\_FIAN\\_International.pdf](https://fian.org/files/files/Open_letter_FIAN_International.pdf).

In light of the above account, the treaty should:

- Retain the new provisions under **Art 14.5(a) and (b)** regarding the need to ensure existing trade and investment agreements are interpreted and implemented in a way that does not undermine the state's capacity to fulfil its human rights obligations and to ensure new trade and investment agreements are compatible with these obligations. However, add language in **Art 14.5(a)** to also require that existing agreements be reviewed and, where necessary, amended if any of their clauses are found to contradict a state's human rights obligations or actually require, encourage or lead to human rights violations.
- Articulate expressly the primacy of international human rights over trade and investment agreements in the **Preamble** to the treaty and add a provision under **Art 14** stating 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.
- Introduce provisions designed to deal with the **State Obligation to Respect** human rights in the context of business activities, including by developing provisions on the state obligation to ensure adherence to international human rights standards by government agents and officials that operate in the context of business activity and to investigate, sanction

and remedy its own failures in this context. These additional articles could be included under **Art 6** on Prevention (as a separate section from current provisions dealing with corporate human rights due diligence) or in a separate new article dealing specifically with **State Monitoring and Enforcement**.

- Introduce new provisions under **Art 6** on **Prevention** (or in a separate new article dealing specifically with **State Monitoring and Enforcement** as mentioned immediately above) on the obligation of the state to require business enterprises that apply for government licences and permits to demonstrate effective compliance with human rights due diligence in relation to the potential human rights impacts of their projects and **as a condition for both receiving and maintaining such licences or permits**.
- Add specific provisions under **Art 6** (as a separate section from current provisions dealing with corporate human rights due diligence) 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.
- The provision on environmental and human rights impact assessments under **Art 6.3(a)** should provide for such assessments to be conducted in a **transparent** and **participatory** manner and drawing from input and knowledge of those likely to be impacted.

- **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.
- Eliminate from **Arts. 6.1** and **6.2(b)** the newly added reference to the corporate duty to **mitigate** human rights abuses as this detracts from important language in the 2019 draft which made clear that prevention was the main goal of human rights due diligence (former Arts 5.1 and 5.2(b)).

## FAILING TO REMEDIATE MASS DISPLACEMENT AND ITS CONSEQUENCES

**Offer of employment:** Under the 2006 Orissa Resettlement and Rehabilitation Policy (the Policy), individuals and families displaced or affected by a development project are entitled to preferential consideration for employment in the project. However, only one family member may be nominated to access this benefit, and the Policy does not even guarantee that one job. There is a hierarchy of preferential hiring according to impact, and families who lose only agricultural land (instead of all or part of their homestead land) are placed at the bottom of the priority list.<sup>34</sup>

**Offer of land:** The Policy does not include provision of equivalent land. Although some land may, subject to availability, be offered to families who lose homestead land (called “displaced families”), this is only for the purpose of rebuilding homesteads. 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.

**Monetary compensation:** the Policy also provides for cash alternatives. Those who are not employed in the project are eligible for a one-time cash pay-out, and families who lose homestead land but opt out of the “resettlement habitat” (i.e. they opt for “self-relocation”) may also be given some cash instead of the lost land.<sup>35</sup> POSCO offered a compensation package which exceeded the rates required under the Policy and extended it to some affected individuals who would not have been entitled to compensation under this Policy. However, these were still one-off payments which equated to one year’s worth of a family’s earnings. Under the Policy, a family that loses agricultural land alone

<sup>34</sup> | The Price of Steel, p. 33.

<sup>35</sup> | The Price of Steel, p. 34.

(i.e. not homestead land) is not considered a “displaced family”, meaning that the compensation they are entitled to is significantly smaller in comparison.<sup>36</sup>

**Excluded people:** 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.<sup>37</sup>

**The Transit Camp:** In 2008, approximately 52 families who supported the Posco-India project resettled in a “Transit Camp” constructed by POSCOIndia in Badagabapur village. This was a temporary resettlement facility meant to house families while a permanent rehabilitation colony was constructed elsewhere.<sup>38</sup> These families agreed to move to the Transit Camp after clashes with members of their villages who opposed the project.

The living conditions in the camp were deplorable. Entire families were made to live in single rooms with no access to safe and sufficient supplies of water. The building’s roof was made of tin sheets containing asbestos and making the heat inside unbearable during the day. Toilets and other sanitation facilities were filthy and not maintained, and women and girls lacked privacy when using them for bathing. In addition, the Transit

Camp was located far from where people used to live and from work opportunities and cultivable land. This meant that relocated families were unable to maintain their previous livelihoods and became impoverished and economically dependent. The Camp had no medical facilities and impoverished families – now more prone to illness - were unable to pay for private medical attention.<sup>39</sup>

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<sup>36</sup> | The Price of Steel, p. 35.

<sup>37</sup> | The Price of Steel, p. 35.

<sup>38</sup> | The Price of Steel, citing a Q&A document in the company’s website: “POSCO-India to the best of its abilities will try and provide a better way of life to the displaced and affected people. All issues related to rehabilitation colony and other amenities will be discussed in the RPDAC (Rehabilitation and Periphery Development Advisory Committee) with representation from the to-be-displaced families...”, p. 67.

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<sup>39</sup> | The Price of Steel, p. 6, 63-69. Given the appalling living conditions in the Camp, by 2014 most families had returned to their villages, with reportedly only 12 families still left in the Camp. See Posco’s Odisha Project: OECD National Contact Point Complaints and a Decade of Resistance (2015) <https://corporateaccountabilityresearch.net/njm-report-v-posco-odisha>, p. 21. See also Press Trust of India, “Odisha: Ten more pro-Posco families return to their village”, Business Standard, 10 June 2014, <https://www.news18.com/news/india/odisha-ten-more-pro-posco-families-return-to-their-village-694003.html>.

## LESSONS FOR THE TREATY

In the handling of the land acquisition process, India failed to adhere to international standards protecting people from forced evictions (a gross violation of human rights), as laid down in particular under General Comment No. 7 on the Right to Adequate Housing of the UN Committee on Economic, Social and Cultural Rights and the UN Basic Principles and Guidelines on Development-based Evictions and Displacement.<sup>40</sup> In particular, it failed to exhaust all feasible alternatives to forced evictions<sup>41</sup> by engaging in genuine consultation with those at risk of eviction<sup>42</sup> (as discussed in the section above) and ensuring the provision of adequate alternative housing, land and/or compensation for all losses<sup>43</sup> (as described in this section).

The case reveals serious defects in the measures of reparation offered to project-affected communities. These were insufficient to compensate the full spectrum of harms and ignored the particular circumstances and needs of certain project-affected groups. The offer of employment to one family member is insufficient when more than one family member contributes to the family income. Offer of employment as way of compensation

also tends to disadvantage people who lack the necessary skills. Women are often disproportionately represented in these groups. As the MoEF investigatory committee on the POSCO-India project noted, “The women in these project affected villages are mostly labourers on agricultural land or betel vine cultivation. They are not land owners and due to the poor educational and other skills they are unemployable in highly mechanised companies such as POSCO steel plant.”<sup>44</sup> In addition, land-based productive activities give families the security of long-term access to food and livelihoods, something that is not guaranteed by employment which can last at best a generation and would in any case disappear once the project itself comes to an end.<sup>45</sup> Similarly, a one-time cash pay-out to compensate for loss of land is a totally inadequate means of redressing the long-term harm resulting from the loss of a sustainable, inter-generational source of livelihood.<sup>46</sup>

<sup>40</sup> | From now on, General Comment No. 7 on Forced Evictions, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CESCR/GEC/6430&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CESCR/GEC/6430&Lang=en) and UN Basic Principles on Displacement, [https://www.ohchr.org/Documents/Issues/Housing/Guidelines\\_en.pdf](https://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf).

<sup>41</sup> | Para 13 of the General Comment No. 7 on Forced Evictions and paras 32, 37, 38, 41 and 56(i) of the UN Basic Principles on Displacement.

<sup>42</sup> | Para 13 and 15 of the General Comment No. 7 on Forced Evictions and paras 38 and 39 of the UN Basic Principles on Displacement.

<sup>43</sup> | Para 16 of the General Comment No. 7 on Forced Evictions and paras 16, 21, 43, 52, 59 and 60 to 63 of the UN Basic Principles on Displacement.

<sup>44</sup> | Majority Report of the Committee Constituted to Investigate into the proposal submitted by POSCO India Pvt. Limited for establishment of an Integrated Steel Plant and Captive Port in Jagatsinghpur District, Orissa (18 October 2010), [http://www.indiaenvironmentportal.org.in/files/POSCO\\_Enquiry\\_Committee\\_Report\[1\].pdf](http://www.indiaenvironmentportal.org.in/files/POSCO_Enquiry_Committee_Report[1].pdf) para 19.

<sup>45</sup> | The Price of Steel, p. 33.

<sup>46</sup> | As clearly stated in para 60 of the UN Basic Principles on Displacement: “Where land has been taken, the evicted should be compensated with land commensurate in quality, size and value, or better.” Para 16 of General Comment No. 7 on Forced Evictions also establishes that those subject to forced evictions must be guaranteed – subject to a state’s maximum available resources – “adequate alternative housing, resettlement or access to productive land, as the case may be, is available” to those subject to forced evictions. The inadequacy of monetary compensation for loss of productive land has now been made evident. Nuagaon villagers who agreed at the time to give up land and crops in exchange for compensation have now exhausted all the money, have no prospects of being employed in a project that has since been paralysed, and have no remaining means to sustain themselves. Those who once owned betel vines have had to start making a living as daily-wage labourers in vineyards owned by others. See Priya Ranjan Sahu, “As Posco exits steel project, Odisha is left with thousands of felled trees and lost livelihoods”, Scroll.in, 22 March 2017, <https://scroll.in/article/832463/as-posco-exits-steel-project-odisha-is-left-with-thousands-of-felled-trees-and-broken-job-promises>.



Dalits were disproportionately affected by the compensatory regime. Since no compensation was offered to landless labourers not engaged in betel cultivation and Dalits tend to represent the majority within these groups, the exclusion criteria disproportionately affected them in contravention of international standards regarding equal protection regardless of formal title to land and non-discrimination.<sup>47</sup> Finally, the living conditions in the Transit Camp, and its distance from employment options and services, rendered people who chose to relocate to this site vulnerable to additional human rights violations, in breach of international standards requiring “adequate alternative housing” and the avoidance of any further victimisation.<sup>48</sup>

To avoid the deficiencies in compensatory regimes illustrated by the POSCO-India project and the many human rights abuses they can lead to, the draft treaty should include additional provisions concerning risk assessments and the right to remedy. It should specify that risk assessments must be designed and implemented in a way that allows project proponents to identify each and every individual that stands to suffer harm, including future

harm, and the nature of this harm. The internal community divisions that resulted from the project are a good example of the broad and diverse range of harms that typically result from this type of project. Key to achieving this is to ensure ample community participation and input. Reparation must in turn be offered to all affected people and cover all identified harms (not a pre-selected category of people or harm), respond to the different realities and needs of those affected and avoid further victimisation.

In light of the above account, the treaty should:

- Expand the scope of applicable human rights standards in **Art 3.3** by adding “other relevant UN principles and standards on human rights”. In addition, add reference to human rights treaty body commentary as relevant interpretation of the applicable international human rights instruments either in **Art 3.3** itself or in the **Preamble**. This is fundamental in order to ensure all impacts are adequately captured and contemplated for purposes of remediation.
- 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.
- 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

<sup>47</sup> | In particular, para 10 of General Comment No. 7 on Forced Evictions which states that the non-discrimination provisions of articles 2.2 and 3 of the [UN Covenant on Economic, Social and Cultural Rights] impose an additional obligation upon Governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved. Particularly relevant are also paras 14, 21 and 29 of the UN Basic Principles on Displacement.

<sup>48</sup> | Para 16 of the UN Basic Principles on Displacement articulates the right of people to resettlement and to alternative housing that is accessible, affordable, habitable, culturally adequate and suitably located, including by ensuring access to essential services such as health and education. Para 43, in turn, clearly stipulates that evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights, and adds that alternative housing should be situated as close as possible to the original place of residence and source of livelihood of those evicted. Para 16 of General Comment No.7 on Forced Evictions reiterates some these principles.

need for reparations to be comprehensive and cover all, and not only a limited number of harms.

- Establish the principle that reparation measures must take into account and compensate for future harm. This could be included in **Art 4** on the **Rights of Victims** or **Art 8.5** which addresses the state obligation to ensure effective reparations.
- Establish the principle that reparation measures must take into account and respond to the differentiated impacts that 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.

## SUPPRESSION OF GRASSROOTS RESISTANCE

The POSCO-India project faced strong opposition from the outset.<sup>49</sup> In August 2005, grassroots resistance to the project organised into the POSCO Pratirodh Sangram Samiti (Anti-POSCO People's Movement or "PPSS").<sup>50</sup> India responded to peaceful opposition by restricting the movement of villagers, engaging in violence and arbitrarily arresting those resisting the project.<sup>51</sup> 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.

**Violent repression of protest:** 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. One particularly violent repression in May 2010 resulted in over 100 persons being injured, five of them critically, and residents' houses and shops being set on fire.<sup>52</sup>

**Police bias:** Villagers opposing the project were subject to harassment and violence allegedly from people supporting the POSCO-India project.<sup>53</sup> Project opponents have alleged that the police did not register or delayed their response

<sup>49</sup> | The Price of Steel, p. 11.

<sup>50</sup> | <https://www.escr-net.org/member/posco-pratirodh-sangram-samiti-ppss>.

<sup>51</sup> | The Price of Steel, p. 18.

<sup>52</sup> | As documented by a fact-finding team lead by a former Bombay High Court judge called to examine this particular case. The Price of Steel, p. 37-39.

<sup>53</sup> | The Price of Steel, p. 41. The project fractured the local community. A group of villagers from Nuagaon who supported the project organised themselves into the "United Action Committee". This led to many clashes between pro-Posco and anti-Posco groups. Priya Ranjan Sahu, "As Posco exits steel project, Odisha is left with thousands of felled trees and lost livelihoods", Scroll.in, 22 March 2017, <https://scroll.in/article/832463/as-posco-exits-steel-project-odisha-is-left-with-thousands-of-felled-trees-and-broken-job-promises>.

to reports of crimes and threats against them. POSCO opponents were killed in at least two violent clashes in June 2008 and March 2013. The police allegedly took 24 and 15 hours respectively to arrive, despite being stationed nearby. A national fact-finding mission that investigated the second incident concluded that the police were not acting impartially and were, on the contrary, colluding with POSCO supporters and the local administration to facilitate the illegal land acquisitions.<sup>54</sup>

**Arbitrary arrests/criminalisation:** Odisha's government used false criminal charges and arrests as tools to suppress protest against the POSCO-India project. Estimates range from 1500 to 3000 spurious charges filed against individuals for various crimes, including murder, rape, destruction of property and kidnapping.<sup>55</sup> Opposition leaders were specifically targeted.<sup>56</sup> Charges were often laid without any previous police investigation and led to many arbitrary arrests on little or no evidence. People who were arrested spent from short periods of time to many months in jail before they could secure bail. The police also filed charges against a large number of unspecified individuals registered as "others" alongside only a few named individuals. This allowed the police to later arrest any individual and join them to an existing case despite not being specifically named. Because so many charges were laid in this manner, community members did not know whether at any point in time they may have criminal charges pending against them. This made residents feel permanently unsafe and reluctant to leave their

homes for fear of being arrested.<sup>57</sup> This practice continued over the years. New warrants were reported to have been issued against around 2,500 people, including 500 women, in 2017. As of January 2021, many of these false charges were still pending.<sup>58</sup>

**Restriction on movement and consequences on other human rights:**

Indian police placed intermittent checkpoints and physical barriers to cordon off the villages and restrict the movement of project opponents. Combined with the fear of being arrested or attacked by project supporters, these physical and psychological barriers had the effect of placing villages under siege. The restriction on people's movement had a detrimental effect on their health and standard of living. Many could or would not visit health centres located outside their village. Many were unable to access their crops or markets which were located outside their village's borders, losing their income or access to food and other supplies. The constant state of alert and fear and diminished ability to secure essential necessities seriously affected people's mental health.<sup>59</sup> The state of insecurity also often prevented children from attending school. In addition, the police occupied the local schools for prolonged periods of time, making the buildings or many classrooms physically unavailable.<sup>60</sup>

<sup>54</sup> | The Price of Steel, p. 41-45.

<sup>55</sup> | Alternative Law Forum, Delhi Forum, Captive Democracy: Abuse of the Criminal System and filing false cases to curb dissent against the Posco Steel Plant in Odisha (2013).

<sup>56</sup> | Abhay Sahoo, the President of PPSS was arrested on several occasions and has over 60 cases registered against him. The Price of Steel, p. 49. See also Letter from Fian International to Chief Minister of Odisha of September 2019, [https://fian.org/files/files/Intervention%20letter%2016\\_09%20\(002\).pdf](https://fian.org/files/files/Intervention%20letter%2016_09%20(002).pdf), p. 7.

<sup>57</sup> | The Price of Steel, p. 47-50.

<sup>58</sup> | Fian International, Corporate Takeover Proceeds despite Illegalties, 19 December 2019, <https://fian.org/en/news/article/corporate-takeover-proceeds-despite-illegalties-2270>. See also Letter from Fian International to Chief Minister of Odisha of September 2019, [https://fian.org/files/files/Intervention%20letter%2016\\_09%20\(002\).pdf](https://fian.org/files/files/Intervention%20letter%2016_09%20(002).pdf), p. 8.

<sup>59</sup> | The Price of Steel, p. 60-61.

<sup>60</sup> | The Price of Steel, p. 52-62.

## LESSONS FOR THE TREATY

India not only failed to create an enabling environment for the exercise of the rights to freedom of expression, association and assembly, but it aggressively sought to suppress peaceful dissent through the excessive use of force and misuse of the criminal justice system. In doing so, India violated many of its obligations under the International Covenant on Civil and Political Rights, including the obligation to guarantee the rights to peaceful assembly and association, freedom of expression, life, liberty and personal integrity. India also failed to ensure that any deprivation of liberty took place in accordance with procedures established by law, including in particular those guaranteeing a fair trial. The virtual siege of villages by the police breached villagers' right to freedom of movement and led to violations of many economic and social rights. Once again, the facts of the case demonstrate the need for the treaty to lay down robust provisions on the state's own obligation to respect human rights in the context of business activity.

Posco-India opponents are human rights defenders entitled to specific protections under the 1998 UN Declaration on Human Rights Defenders. These include protection from criminalisation and arbitrary arrest under false charges, from violence and intimidation by both state and non-state actors and from deprivation of liberty because of the work they do. The case is emblematic of a global trend toward increasing suppression of peaceful protest and freedom of expression, characterised in this instance by concerted action by government institutions to suppress

opposition by targeting particularly prominent individuals and instilling fear among protesters to debilitate and deter further resistance. If not directly requested or instigated, companies are often silent and passive beneficiaries of this action. Whichever case, they run the risk of being complicit in the police brutality, and the treaty should include strong provisions to capture this mode of participation in human rights violations.

The case demonstrates once again the importance of standards such as the UN Declaration on Human Rights Defenders in the context of business activity and points to the need for the treaty to include these standards in the definition of applicable human rights by listing them expressly or including them by way of open lists or definitions.

In light of the account above, the treaty should:

- 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 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.

- 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.

## **SOUTH KOREA’S RESPONSIBILITY AS A HOME STATE**

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.

**South Korea’s Human Rights Obligations:** In 2011, the UN Committee on the Rights of the Child noted that businesses from the Republic of Korea “are reported to be signing, or planning to sign, land leases in various countries with negative implications for, inter alia, the right to water and housing.” It recommended that Korea “further promote the adoption of effective corporate responsibility models by providing a legislative framework that requires companies domiciled in Korea to adopt measures to prevent and mitigate adverse human rights impacts in their operations in the country and abroad, whether by their supply chains or associates.”<sup>61</sup> In 2013, a large number of UN Special Procedures issued a statement expressing concerns about the Posco-India project and highlighting the responsibility of South Korea to take measures to ensure businesses based in its territory, such as POSCO, did not adversely impact human rights when operating abroad.<sup>62</sup>

Despite these recommendations, South Korea has so far failed to develop a legislative framework to regulate corporate activity abroad.<sup>63</sup>

**National Contact Point (NCP) Complaints:** In October 2012, complaints against POSCO

<sup>61</sup> | CO Republic of Korea, 58th Sess., Sept 19-Oct. 7, 2011, UN Doc CRC/C/KOR/CO/3-4, 26-27.

<sup>62</sup> | ‘India: Urgent call to halt Odisha mega-steel project amid serious human rights concerns’, [https://sr-watersanitation.ohchr.org/en/Pressrelease\\_India.html](https://sr-watersanitation.ohchr.org/en/Pressrelease_India.html).

<sup>63</sup> | In August 2018 South Korea adopted a Human Rights National Action Plan which contains a chapter on business and human rights. However, none of its commitments under this chapter include legislation to ensure Korean businesses respect human rights throughout their global operations. See <https://globalnaps.org/country/south-korea/#:~:text=The%20NHRC%20presented%20its%20recommendations,on%20business%20and%20human%20rights>.



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. To justify the rejection, South Korea's NCP explained that the allegations concerned the legality of activities of the provincial government of India over which it deemed to have no say.<sup>64</sup>

In contrast, the case before the Dutch NCP proceeded and ended in a joint agreement between the parties which included steps APG (as administrator of ABP's funds) would now take in order to prevent or mitigate any potential negative impacts related to their minority shareholding in POSCO and to continue APG's efforts to influence the company. In its final statement, the Dutch NCP concluded that investors had a responsibility to exert influence on companies they had investments in to help prevent or mitigate harm even when they are only minority shareholders.<sup>65</sup>

Although the Norwegian NCP pursued the case against NBIM, the company maintained that the OECD Guidelines for Multinational Enterprises did not apply to minority shareholders and refused to engage with the NCP. Maintaining the opposite view, the Norwegian NCP concluded that NBIM had violated the Guidelines by refusing to cooperate and by not having a strategy on how to react if it became aware of human rights risks related to companies in which it had invested. It also outlined a series of recommendations for improvement.<sup>66</sup>

## LESSONS FOR THE TREATY

South Korea not only failed to intervene to prevent human rights abuses by a Korea-based company in India, but it failed to provide remedy to project-affected individuals who sought remediation through the country's NCP. In its decision, the Korean NCP conveniently focused on India's actions and totally disregarded POSCO's role in the violations. Its reluctance to intervene might be explained to some extent by the fact that the Korean NCP is housed within the Ministry of Trade, Industry and Energy, a ministry primarily focused on advancing business interests, which might have compromised its ability to act with independence and impartiality.<sup>67</sup>

The case highlights the importance of both home and host state action to impose on companies domiciled or operating in their territory or otherwise under their control a duty to respect human rights wherever in the world they operate, and carry out human rights due diligence which covers the activities of all entities in their value chain. In this case, POSCO's due diligence to prevent human rights harm should have covered POSCOIndia's activities and the potential human rights impacts of the Posco-India project. The case also highlights the importance of effective remedial mechanisms in home states as means of both enforcing corporate duties as well as discharging the state's own obligation to guarantee access to remedy.

<sup>64</sup> | OECD, Human rights breaches related to manufacturing of iron in India, <https://mneguidelines.oecd.org/database/instances/kr0010.htm>.

<sup>65</sup> | OECD, Human rights breaches related to manufacturing of iron in India, <https://mneguidelines.oecd.org/database/instances/nl0023.htm>.

<sup>66</sup> | OECD, Human rights breaches related to manufacturing of iron in India, <https://mneguidelines.oecd.org/database/instances/no0009.htm> See also OECD Watch, Lok Shakti Abhiyan et.al vs Government Pension Fund – Global, [https://complaints.oecdwatch.org/cases/Case\\_262](https://complaints.oecdwatch.org/cases/Case_262).

<sup>67</sup> | [http://www.ncp.or.kr/servlet/kcab\\_ency/info/2100](http://www.ncp.or.kr/servlet/kcab_ency/info/2100). By contrast, the Dutch NCP is an independent body housed within the Ministry of Foreign Affairs and the Norwegian NCP is an independent body appointed by both the Ministry of Foreign Affairs and the Ministry of Trade, Industry and Fisheries. See <https://www.oesorichtlijnen.nl/ncp> and <https://www.responsiblebusiness.no/about-us/> respectively.

The intervention of the Dutch and Norwegian NCPs was useful in confirming the human rights responsibilities of financial institutions in relation to the companies in which they are invested regardless of the size of their investment and, in the case of the Dutch complaint, securing commitments with a potential to improve the situation on the ground. However, 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.<sup>68</sup> This case is one of many, which demonstrate the failure of the NCP system to properly address corporate human rights abuses and attest to the current absence of effective transnational and supra-national mechanisms to ensure redress in these contexts. The treaty or a future optional protocol should help close this gap by creating an international mechanism to which affected individuals and communities can turn when avenues for remedy are unavailable or unrealistic at national level, including in the home State of transnational corporations.

In light of the above account, the treaty should:

- Retain provisions in **Art 6.1** concerning the obligation of the state in whose territory a company is domiciled (a home state) to impose on this company a duty to respect human rights and prevent human rights abuses throughout their

operations, but 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.
- Retain the important provisions on liability of a business enterprise for failure to prevent others over which it exercises legal or factual control or supervision from causing or contributing to human rights violations or abuses currently reflected in the first part of **Art 8.7** (to capture relationships of control and supervision embodied by the POSCO-POSCOIndia relationship).
- Retain existing provisions under **Art 7.1** and **Art 9** on **Adjudicative Jurisdiction** that establish the jurisdiction of the courts where a company is domiciled (the company’s home state) to hear claims against this company for alleged human rights abuses wherever in the world these may have occurred (to allow judicial claims against parent companies such as POSCO in their countries of origin).
- 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

<sup>68</sup> | However, it is important to note that this stems from the very fact that the OECD Guidelines themselves are not binding on companies.

ensure courts and state-based non-judicial mechanisms not only have jurisdiction but also the necessary *powers* to ensure they can offer the “adequate, timely and effective remedy” the article refers to and avoid ineffective remedial mechanisms such as the NCPs.

- 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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