

POSCO's Odisha project:

OECD National Contact Point complaints and a decade of resistance

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About this report series

The Non-Judicial Grievance Mechanisms project is an academic research collaboration between the University of Melbourne, Monash University, the University of Newcastle, Victoria University, Deakin University and the University of Essex, funded by the Australian Research Council.

The project will generate a series of case study reports (of which this is one), reports on particular grievance mechanisms, and thematic analytical reports. These reports are intended to inform policy and practice in providing redress for victims of corporate human rights harms.

This is an advance report on the POSCO case study. A final report will be released late in 2015 as part of a suite of case studies.

This report was authored by Samantha Balaton-Chrimes, with invaluable research assistance from Jonathan Schultz.



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Acronyms

ABP/APG	<i>Algemeen Burgerlijk Pensioenfonds/Algemene Pensioen Groep</i> - Dutch Pension Fund
BJD	Biju Janata Dal
BJP	Bharatiya Janata Party
FDI	Foreign Direct Investment
FRA	The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006
IDCO	Industrial Infrastructure Development Corporation (Odisha)
KHIS	Korean House for International Solidarity
LIFE	Legal Initiative for Forests and Environment
MTPA	Million Tons Per Annum
NBIM	Norges Bank Investment Management – Norwegian Pension Fund
NCP	National Contact Point
NGO	Non-Government Organisation
NGT	National Green Tribunal
NHRC	National Human Rights Commission (India)
NYU	New York University
OECD	Organisation for Economic Cooperation and Development
OTFD	Other Traditional Forest Dwellers
PPSS	Posco Pratirodh Sangram Samiti
SOMO	<i>Stichting Onderzoek Multinationale Ondernemingen</i> - Centre for Research on Multinational Corporations
TUAC	Trade Union Advisory Committee
UK	United Kingdom
UN	United Nations
UNOHCHR	United Nations Office of the High Commissioner for Human Rights
US/USA	United States (of America)

Executive Summary

In 2005, Korean steel giant POSCO signed a Memorandum of Understanding with the Odisha state government in India to build a US\$12billion integrated steel project, involving a plant, mine and associated infrastructure. For the ten years since then the project has faced strong opposition from the communities affected by the proposed steel plant, who do not want to relinquish their agricultural lands and face displacement. The conflict between the company and the communities has escalated in that time, and has involved multiple incidents of violence and intimidation by police and other actors against anti-POSCO protestors, and filing of hundreds of criminal cases against protesters, the legality of which has been called into question. This is a case not only of human rights risks and harms, but also, much more broadly, of contests over development agendas, and who gets to set them.

The POSCO project has faced multiple domestic judicial and regulatory hurdles in relation to clearance to divert forest land (on which communities reside) for non-forest purposes, environmental clearances, land acquisition and prospecting licences for iron ore. Some of these are still ongoing. At the same time, the anti-POSCO Peoples' Movement (PPSS) has engaged in non-violent direct action, such as blockades, to prevent land acquisition, and has gained support from a broad informal network of civil society activists in Odisha, India, Korea, the United States (US) and Europe.

Together, the political mobilization and judicial challenges have stalled the progress of the POSCO project for a decade, but the conflict remains unresolved. POSCO has not categorically committed to relocating or stopping its project, as PPSS aims for. At the time of writing, POSCO has acquired a significant portion, but not all, of the land it needs for the plant. No construction has begun at this stage, most likely because the company is still waiting on prospecting licences for iron ore.

The OECD NCP process

In October 2012, Bhubaneswar-based group Lok Shakti Abhiyan, with international supporters filed a complaint to the Organisation for Economic Cooperation and Development (OECD) National Contact Points (NCP) in South Korea, the Netherlands and Norway. The complaint alleged that POSCO had not conducted due diligence or meaningful stakeholder negotiation regarding the human rights and environmental impact of its proposed project, particularly the required land acquisition, and had failed to seek to prevent or mitigate the human rights abuses committed by the Indian state in its violent efforts to acquire land for POSCO. The complaint also argues that minority shareholders, the Dutch Pension Fund *Algemeen Burgerlijk Pensioenfonds/Algemene Pensioen Groep* (ABP/APG) and the Norwegian Pension Fund *Norges Bank Investment Management* (NBIM), should exercise leverage over POSCO to address these human rights concerns, and consider divestment if that fails.

The NCP processes had mixed outcomes. The Korean NCP rejected the case, and the Norwegian Pension Fund refused to cooperate. The Dutch process facilitated discussion between ABP/APG, the

complainants' representatives and, ultimately, POSCO, with the objective of launching a fact-finding mission, which could then form the basis of a dialogue. However, parties could not agree to the terms of the mission, and the complainants refused to engage in dialogue while land acquisition was ongoing, and in the absence of a fact-finding mission.

The major success of this NCP process is a purely policy-based one: it established that minority shareholders have obligations regarding due diligence and facilitating access to remedy in the event of human rights harms to which it is directly connected (even if it has not directly caused or contributed to those harms). This raises the possibility of engaging minority shareholders, particularly those, like national pension funds, that have unique forms of leverage, to pressure companies engaged in human rights harms.

However, the NCP case also demonstrated that there is a lack of functional equivalence between NCPs, as all three generated different outcomes. OECD Watch argues that there is an ongoing and urgent need for all NCPs to be functionally equivalent at the most robust levels of complaint handling.

Furthermore, the failure to launch a fact-finding mission represents a missed opportunity to make a positive impact on human rights fulfilment in Odisha. In a context where most of the information about the project is controlled by POSCO and the largely pro-POSCO government, and there is very little publicly available information about human rights impacts, it is unreasonable for the NCP to expect communities to engage in dialogue based on such information. This pressure demonstrates a failure to appreciate the importance of the political and economic context for the possibilities regarding the resolution of a dispute.

In relation to the OECD NCP process, the report therefore finds that despite some reasonable efforts from the Dutch and Norwegian NCPs, the NCP process made no identifiable positive contributions to protecting, respecting or remedying the human rights concerns directly raised in the complaint.

Enabling and constraining resistance and remedy

This report also examines the broader context in which the communities affected by POSCO have sought remedy for past harms, and sought to resist future harms associated with land acquisition. The report finds that the major constraints to resistance and remedy more broadly, including but not limited to the NCP process, in this case pertain to:

- the political economy of the Odisha context, where all authoritative arms of government are supportive of the project
- an environment of insecurity and intimidation that acts to suppress opposition to the project
- inadequate provision of information about the project's impacts, particularly in relation to social impacts and human rights

The report finds that the significant factors enabling resistance and remedy in this case pertain to:

- The resilience and strength of opposition to the project in the affected area
- The strength of local leadership and organization, including in the form of networks of civil society support from other similar movements across India
- The availability of a socially and environmentally progressive judicial body, the National Green Tribunal (NGT), and a team of legal activists able to engage it
- The multi-pronged support of transnational civil society

The report also finds that:

- The international business and human rights discourse has had ambivalent effects in this case. It has led POSCO, which was previously inexperienced in this area, to develop some voluntary human rights commitments, but has not led to any tangible changes in its business behaviour in India. Furthermore, it may have equipped POSCO with tools to deflect criticism without making changes on the ground, thereby having an ultimately damaging effect on human rights fulfilment.

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Introduction

The POSCO project in Odisha is one of the most controversial industrial developments in India's recent history, mired in multiple layers of increasingly heightened political tensions reaching from local villages, up through the state of Odisha to the Union of India government, and across to Korea, the US and Europe. With an estimated value of US\$12 billion, this project would be the biggest foreign direct investment ever in India and has support from almost all arms of Indian and Korean governments, with particularly strong support at the Odisha state government level.

The dispute between POSCO and local communities relates to land acquisition and environmental risks. In formal terms this conflict has largely revolved around environmental impact assessments and other administrative details, but more centrally it has been a battle over different notions of development, and competing aspirations for the land at the proposed project site. This battle is taking place in a highly unusual political context: Odisha is industrializing at a rapid rate, but this approach to development has been heavily opposed by a strong and experienced network of anti-displacement movements who protest 'growth without inclusion' and the severe negative social and economic effects of displacement (Panda, 2008; Dash and Samal, 2008). At the same time, there is a widespread consensus among Odisha's middle class and elite that industrialization is the key to economic growth and poverty reduction, and the media and politicians seek to portray those who oppose industrialization as obstructing these goals.

The opposition to the project has been spearheaded by POSCO Pratirodh Sangram Samiti (PPSS, Anti-POSCO People's Movement), a movement based in the villages that will be displaced for the steel plant. Since a Memorandum of Understanding (MoU) was signed between POSCO and the Odisha government in 2005, the company has been held at bay partly by PPSS' non-violent direct action protests against land acquisition, combined with supporting activists' use of administrative and judicial appeals and domestic and transnational campaigning.

More recently, since around 2012, civil society groups, particularly human rights groups, working in solidarity with PPSS at the state, national and international levels have begun to pursue more formal channels of complaint making. This includes a complaint to the South Korean Organisation for Economic Cooperation and Development (OECD) National Contact Point (NCP)¹ (regarding POSCO) and the Dutch and Norwegian NCPs regarding their national pension fund investments in POSCO. The complaint had mixed outcomes, and a meaningful process was only pursued through the Dutch NCP. Attempts were made to establish a fact-finding mission and subsequent dialogue between the parties, including POSCO. However, no agreement could be made on the mission and the process stalled.

¹The OECD Guidelines for Multinational Enterprises require OECD NCPs to be established in every OECD member state in order to promote the Guidelines and receive complaints (termed 'specific instances') about OECD businesses or business operations in OECD countries.

Consequently, the NCP case has had no tangible impact on human rights fulfilment in this case. It did, however, establish that minority shareholders have obligations regarding due diligence and facilitating access to remedy in the event of human rights harms to which it is directly connected (even if it has not directly caused or contributed to those harms), a precedent that could be useful in future campaigns.

At the time of writing (June 2015), construction on the POSCO project has still not commenced, but nor has it been cancelled. Some but not all the required land has been acquired for the plant, but the company is not proceeding with works until it has secured a mining licence for the iron ore. PPSS continues to struggle against POSCO and the Odisha state government through protest actions and legal cases related to forest clearances, with the support of human rights groups.

After outlining the POSCO Odisha project, a profile of the affected communities and the human rights concerns this project raises, this report evaluates four key avenues of resistance and the pursuit of remedy: domestic legal and regulatory channels, domestic political mobilization, transnational civil society mobilization, and the OECD NCP process. The report concludes with an analysis of the factors that have enabled and constrained resistance (to the project) and access to remedy (for the violence, intimidation and irregular land acquisition), and some lessons learned about the use of transnational, non-judicial grievance mechanisms.

The focus throughout the report is on the opposition to the project in Jagatsinghpur district, where the proposed steel plant is to be constructed. It is beyond the scope of this report to explore resistance to the mining project in the Khandhadhar hills, beyond a brief introduction. Importantly, this report explores both *avenues of resistance* and *avenues through which remedy has been sought*, as grievances relate both to concerns about future harms, and appeals for remedy of harms that have already taken place throughout the ten years since the project was agreed with government.

Table 1: POSCO case summary

Resistance and redress strategies	<ul style="list-style-type: none"> • South Korean NCP (re. POSCO); Norwegian NCP (re. NBIM investment in POSCO); Dutch NCP (re. ABP/APG investment in POSCO) • Domestic legal avenues, including National Green Tribunal (NGT) and Odisha High Court • Domestic political mobilisation (PPSS) • Transnational civil society mobilisation • Various other mechanisms, including National Human Rights Commission (NHRC)
Human rights issues	<ul style="list-style-type: none"> • Forcible displacement • Government sponsored violence, intimidation and questionable criminal charges • Environmental risks
Companies	<ul style="list-style-type: none"> • POSCO and its wholly owned subsidiary POSCO India • Dutch Pension Fund (ABP/APG)² • Norwegian Pension Fund (NBIM)³
Affected people	<p>Affected by the steel plant in Jagatsinghpur district: 8 villages in the three gram panchayats of Dhintkia, Gobindapur and Gadakujanga, a total population of 22 000 people.⁴</p> <p>Affected by proposed mines in Keonjhar and Sundargarh districts: 32 villages in Keonjhar, and 84 villages in Sundargarh, predominantly scheduled tribes (Mining Zone Peoples' Solidarity Group, 2010: ii).</p> <p>All facing potential physical and/or economic displacement.</p>
Business project	<ul style="list-style-type: none"> • A 12 Million Tons Per Annum (MTP) green field steel plant, captive mine(s), and associated infrastructure, including a captive port and townships at plant and mine sites. • US\$12 billion investment – biggest Foreign Direct Investment (FDI) ever in India.
Connections outside India and Korea, including in the United Kingdom (UK) and Australia	<ul style="list-style-type: none"> • POSCO has unrelated business activities in Australia, including in the controversial Adani coal mining project in the Galilee Basin, Queensland, where POSCO is commissioned to build the railway to transport the coal to Abbott point (Australian Resources 2014). • Norwegian and Dutch pension funds invested in POSCO. • Major banks and financiers invested in POSCO in the USA include Berkshire Hathaway, JPMorgan Chase, Bank of NY Mellon, Deutsche Bank and Blackrock (IHRC and ESCR-Net, 2013: 69).

² The Dutch Pension Fund, *Stichting Pensioenfonds ABP* (National Civil Pension Fund) is the pension fund for employees in the government, public and education sectors in the Netherlands. APG carries out the administration of pensions for approximately 2.6 million Dutch people, including ABP's assets. They are referred to throughout this report as ABP/APG (Lok Shakti Abhiyan, 2012: 5).

³ Norges Bank Investment Management (NBIM) is the asset management wing of the Norwegian Central Bank. It manages the Norwegian Government Pension Fund Global on behalf of the Norwegian Ministry of Finance, and is one of the world's largest investment funds, with a portfolio value of approximately \$US650 billion (Norwegian NCP, 2013: 15).

⁴ Gram panchayats are level of democratic decision making below a district. Gram sabhas is a term used in the region to refer to the meetings and decisions of the panchayats. Each panchayat entails multiple 'palli sabhas' or village-level committees.

Methodology

This report is part of a series based on the findings of a three-year Australian Research Council Linkage Project analysing the effectiveness of non-judicial grievance mechanisms in responding to human rights concerns in which transnational business activity is involved. We adopt a broad definition of non-judicial grievance mechanisms, namely, those that are mandated to receive complaints, but are not empowered to produce legally binding adjudications. In examining grievance mechanisms, the project considers which factors have contributed to more or less effective outcomes, prioritising the perspectives of the adversely impacted workers and communities seeking redress.

This case study is the companion to another report in this series, *The National Contact Point report*, which compares the POSCO case with the complaints made to the UK NCP about UK mining company Vedanta. The Vedanta case study report will also be relevant companion reading, as it details a similar struggle, on the part of the Dongria Kondh adivasi or 'tribal' peoples of Niyamgiri, also in Odisha.

This report is informed by extensive semi-structured interviews with more than 40 people over three visits to Odisha (in March 2012, December 2012 and December 2013) and Korea (in November 2012). These interviews were with company officials, members of PPSS, civil society organisations in India and beyond, and other relevant experts, such as journalists. In addition, information is drawn from relevant secondary research, including online media articles, civil society organisations and company websites, and judicial documents.

This is an advance release of this case study report. The draft conclusions of this report were shared with key research participants from March to May 2015, and their comments were considered when preparing this version. A final version will be released as part of a suite of case study reports from this research project in late 2015.

POSCO's Odisha project

Under the 2005 MoU between POSCO India and the State Government of Odisha, a US\$12 billion investment would facilitate construction of an integrated steel plant, mine and associated infrastructure.⁵ Protests through both formal and informal avenues, discussed in detail below, have prevented the project from advancing for nearly 10 years. However, POSCO shows no signs of giving up. On its website, POSCO India states that "Odisha is one of the most important places and prime project for POSCO so there is no plan to pull back and shift the project" (POSCO-India 2015a).

Box 1: Summary of proposed POSCO project

Integrated steel plant

12 million tonnes per annum (MTPA) (3 phases x 4MTPA each), reduced to 8MTPA (2 phases x 4 MTPA each) after difficulties acquiring land

Mine

600 million tonnes of captive iron ore over 30 years, in Keonjhar and Sundargarh districts in Khandadhar hills; and government supported access to an additional 400 million tonnes on open markets

Infrastructure and townships

Captive port at mouth of Jatadhari river, 10km from Paradip, in Dhinkia, Nuagaon and Gadakujanga panchayats (Paul, 2012: 5; MZPSG, 2010).

1500 acre township (segregated between Koreans and Indians) adjacent to plant

500 acre township near mining site

Other yet to be determined infrastructure, including rail and other transport, and water

Captive power plant – 1300 Mega Watt (MW) per annum capacity, to be included in plant site

This project would be the biggest foreign direct investment ever in India, and has attracted significant support from the majority of government in Odisha, India and Korea. In order to attract this investment to the state, the State Government of Odisha offered POSCO generous terms on which it can establish its integrated operations in India. The generous nature of these terms has been criticized by Indian steel

⁵ The MoU between the State Government of Oriss and POSCO was signed in 2005, and expired in 2010. No replacement MoU has yet been established, and both parties appeared to be operating on the conditions of the original MoU until early 2015, when conditions for access to the iron ore changed as a result of a change in national policy. This is discussed further below.

companies that have not benefitted from the same generosity (Mukhopadhyay, 2006),⁶ and by civil society for being an elite-facilitated arrangement that is beneficial only for POSCO and not for the people of Odisha (Mukhopadhyay, 2006; Viswanath, 2008: 31).

For POSCO, this MoU provides access to large quantities of cheap, high quality iron ore that is not available in Korea that can help the company maintain commercial success and continue to play a key role in South Korea's industrial base (Panda et al., 2008: 291). By also guaranteeing government-facilitated access to a further 400MT of iron ore on the open market, as well as access to a host of other required natural resources, SEZ status, 100% equity ownership, and cheap land and labour for its steel plant, the MoU positions POSCO at the forefront of India's iron ore and steel markets, and reinforces its position as a major force in international markets (Mukhopadhyay, 2006: 45; Adduci, 2012: 77).⁷

In return, POSCO promises that the proposed project will bring significant direct and indirect benefits to the immediately affected and wider communities in Odisha and India, including injecting Rs12,100 crores (USD1.95 billion)⁸ to the state's GDP annually (POSCO India, 2013a), amounting to 11.5% of the state's GDP by 2016-2017 (National Council for Applied Economic Research (NCAER), 2006: i), annual tax revenue of Rs2620crores (USD 421 million) (POSCO India, 2013a), and providing 870 000 jobs over 30 years, due to the cumulative impact of POSCO-India operations (NCAER, 2006: i), 18 000 of which will be direct jobs (POSCO India, 2013a). However, as POSCO is a sponsor of NCAER, a conflict of interest that was not disclosed in the report, its impartiality has been questioned, and its methodology criticized both on technical grounds that render far lower indicators of economic benefit, and because the 'cost-benefit' analysis did not measure any costs (Maringanti et al., 2013; MZPSG, 2010). An alternative analysis, by the Mining Zone Peoples' Solidarity Network, a network of academic researchers opposing POSCO, argues that the project will generate only 7000 direct jobs and a maximum of 17,000 direct and indirect jobs over 5- 10 years, representing a reduction in unemployment in Odisha of only 1.7% (MZPSG, 2010: ii). Many commentators, including those that support the project, have noted that the increasing mechanization of steel production means it provides fewer jobs in general, and those it does create require skilled labour and are therefore unlikely to benefit Odisha's poor (MZPSG, 2010: ii; Panda et al., 2008: 296; Asher, 2009: 31). Lastly, POSCO will also contribute 2% of its profits to social causes (required under the Indian Companies Act 2013), to supplement existing corporate social responsibility activities of the POSCO TJ Park Foundation (POSCO

⁶ The main criticism from Indian steel companies is that POSCO has been granted preferential access to the high quality iron ore in the Khandadhar hills (this is discussed further below), and that the MoU permits 'swapping', or export, of 30% of its iron ore on the condition that it imports an equivalent quantity with a lower alumina content. Indian firms argue that they could use the iron ore domestically.

⁷ POSCO elected to undertake this project in India as opposed to Brazil or China, the two other locations it considered, because of the relative generosity of these terms. Brazil refused to sell its iron ore at less than the market rate, and China would not allow majority foreign shareholding for such an operation (Srinivas, 2005; Acharya, 2010)

⁸ All conversions were made at January 2015 exchange rates.

2015c). The company promises “larger scale CSR and peripheral development activities will be started when the land preparation works start after the land is cleared and handed over to POSCO” (POSCO-India –2015a).

Affected communities and human rights issues

The size and scale of the POSCO project in Odisha means that multiple different communities are affected by its activities, as outlined in Box 2.

Box 2: Affected communities

Plant area (4004 acres)

- 3566 acres is government land, and 438 acres is private land (occupants have titles)(POSCO India, 2013)
- 3097 acres is forest land (for which the Government of Odisha has to apply for permission to divert forest land for other purposes)(Paul, 2012: 5)
- 8 villages in the three gram panchayats of Dhinkia, Gobindapur and Gadakujanga, a total population of 22 000 people (Pingle et al., 2010: 52; IHRC and ESCR-Net, 2013: 12; Asher, 2009:11; MZPSG, 2010: 6).⁹
- After the Odisha High Court issued a stay order regarding tree felling on private land, plans changed to acquire land in two phases: Phases I & II of 2700 acres, mostly government land, and Phase III of 1700 acres, including the village of Dhinkia, which has seen the biggest protest (POSCO-India 2015a).¹⁰
- The government has already acquired 1703 acres for this site, and handed it over to POSCO (Odisha Sun Times 2015).¹¹

Mine areas

- Prospecting for 6,177 acres (MZPSG, 2010: 6), so far with no clear territorial demarcation
- 32 villages in Keonjhar, and 84 villages in Sundargarh (MZPSG, 2010: ii)
- Predominantly scheduled tribes, in particular the Paudi Bhuiyans.

⁹ POSCO’s estimate, drawn from a Xavier Institute of Management study (commissioned by POSCO and not public) suggests 466 families will be immediately displaced, with a total of 718 families displaced over 20 years (POSCO-India 2013a). The Roy Paul Committee, a Ministry of Environment and Forests committee established to review POSCO’s environmental clearances, estimates 471 families will be immediately displaced (Paul, 2012: 5).

¹⁰ The Odisha state government’s Industrial Development Corporation (IDCO) told the Roy Paul Committee, convened to review POSCO’s environmental impact assessments, in 2012, that the project area for the plant was reduced to 2700 acres by leaving out most of the private land in Dhinkia and Gobindapur villages, and the portion of forest land where people from these villages grow their betel vines, changing the layout of the site (Paul, 2012: 21). POSCO’s website explains, “We have minimized our area by changing our steel plant layout. We avoided certain densely populated regions in Dhinkia, Gobindapur & Nuagaon and efforts are underway to minimize the displacement” (POSCO-India 2015a). The exclusion of private land from POSCO’s plans came after the Odisha High Court issued a stay order on tree felling on private land, in response to a petition from villagers arguing that land acquisition for POSCO did not qualify as ‘public purpose’ under the Land Acquisition Act 1894. For further discussion of this case, see below.

¹¹ Under section 5(vii) the 2005 MoU, land acquisition is the government’s responsibility, and POSCO must pay the government for the land (MoU, 2005). While finalising this report, it was reported that the Government of Odisha has asked for POSCO to either pay a sum outstanding for the 1703 acres of land the Government has handed over to POSCO, or hand the land back (Odisha Sun Times 2015).

This report focuses on avenues of human rights redress pursued by people living in the proposed plant area. People in the other areas have been less active in their protest against the POSCO project. The exact territorial demarcation for the prospecting has been unclear and no land acquisition has been imminent, as it has been in Jagatsinghpur. Nevertheless, some scheduled tribes in the Keonjhar and Sundargarh districts have organized into protest movements, particularly Khandadhar Surakshya Sangram Samiti (Asher, 2009: 19; Odisha Sun Times 2014). Following these communities' responses to POSCO will be an important area for future research.

The following section outlines the major human rights issues at stake in POSCO's proposed plant area in Jagatsinghpur. Many of the human rights concerns raised here relate to actions of the State Government of Odisha. However, the United Nations (UN) Guiding Principles on Business and Human Rights clearly state that "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved" (UNOHCHR, 2011: 13).

Forcible displacement

At the heart of the opposition to the POSCO project is a refusal on the part of the majority of the affected communities to move from their homes. In this section, we outline the reasons why people refuse to move, and the human rights concerns raised by the way in which POSCO and the Government of Odisha, working to acquire the land on POSCO's behalf, have responded to this opposition. These include POSCO's proposal of an inadequate (and, for many, unwanted) compensation package; the Government of Odisha's obstruction of applications for Other Traditional Forest Dweller status (which would entail stronger land rights), and; the inadequacy of POSCO's consultation and the company and government's failure to acquire consent for the land transfer.

The majority of villagers in the three affected gram panchayats do not want to move because they currently enjoy a profitable and sustainable small-scale agricultural livelihood that is not easily replicable elsewhere because of the unique ecology underpinning these activities. Displacement and move to a wage labour livelihood (guaranteed for only one member of each family) and urbanized lifestyle would constitute a significant deterioration in their living standards, like that which communities are aware has occurred in other parts of Odisha (Mathur, 2009). The district of Jagatsinghpur, where the proposed plant and port are to be constructed, hosts a highly productive and relatively (by rural Indian standards) lucrative agricultural economy. The majority of villagers cultivate a range of crops including betel,¹² paddy, cashew and other tree species, as well as collecting minor forest products such as bamboo and fuel (Pingle et al., 2010: 19), while some engage in fishing, operate shrimp farms (pisciculture) or practice animal husbandry (IHRC and ESCR-Net, 2013: 12-13). Of these

¹² Paan is a mix of betel leaves and other ingredients that is consumed widely in Asia.

livelihood activities, betel cultivation and trading is the most lucrative, earning an average annual profit of about Rs. 200,000 [U.S. \$ 3374] in 2010 for the owner (IHRC and ESCR-Net, 2013: 12), and providing additional employment for landless labourers (Asher, 2009: 12). In addition to the income stream provided by cultivation of betel, shrimp or cashews, families in the affected villages in Jagatsinghpur also supplement their livelihood in significant ways by accessing common resources, including rice, fish and forest products that are gathered locally and used for household consumption (MZPSG, 2010: 37-38). Furthermore, these livelihoods engage all members of the family in productive work (MZPSG, 2010: 35). In a context of deteriorating agricultural production and associated impoverishment and marginalization of rural populations in Odisha, this successful agricultural way of life is significant (cf. Mishra, 2011).

Inadequate compensation

For the 718 families it calculates will be displaced, some of whom live on private land and others on government land (POSCO India, 2013a; POSCO-India 2015a), POSCO is offering a compensation package that exceeds the requirements of the Odisha Resettlement and Rehabilitation Policy by providing equal compensation to those on government land as those on private land, paying more generous cash compensation per decimel of lost agricultural land and for transport, providing better quality housing to replace lost homes, and providing some (limited) compensation for landless labourers and fisherman, as well as for paddy farms and trees. The package also provides for skills training and one job per family after the construction phase of the plant, with preferential hiring by contractors during the construction phase (POSCO-India 2013c). This was agreed through a Rehabilitation and Peripheral Development Advisory Committee constituted by government officials and some village representatives (Mishra 2014: 39). Interviewees in our study, consistent with other studies about the POSCO project, report that this package has been rejected by many anti-POSCO protestors in the affected villagers on principle, contrary to POSCO's claims that there it has been widely endorsed in the affected communities (MZPSG, 2010: 8; Interview with Prasant Paikray, PPSS Spokesperson, Bhubaneswar, December 2012).

Though the compensation package exceeds government requirements it has significant shortcomings.¹³ Most centrally, other studies have found that community members that oppose the package are reluctant to accept cash compensation and become wage labourers earning significantly less than their current cash income and other resources, and with little reasonable hope of job security given their skills (IHRC and ESCR-Net, 2013: 12; MZPSG, 2010: ii). For these people, no amount of compensation is able to replace the sustainable and abundant (relatively speaking) land and livelihood that communities currently enjoy. Displacement and a move to wage labour are also known to be particularly detrimental

¹³ The Odisha State Government Resettlement and Rehabilitation has itself been criticized for not being sufficient to mitigate the significant risk of impoverishment and other negative but intangible harms associated with displacement (Mathur, 2009).

for women, whose position within the family and community becomes diminished with loss of access to independent resources, and general deterioration of social and community conditions in which they live (Pingle et al., 2010: 52; Mathur, 2009). Furthermore, research from other cases suggests that cash compensation is not able to fully address the intangible consequences of displacement, including disruption of traditional social structures and informal social networks, undermining of social bonds and capacity for mutual support, reduced social status in and conflict with host communities, and generation of conditions dangerous and disadvantageous for women who lose their status in the family and community and can become targets of hostility (Mathur, 2009).

Obstruction of efforts to acquire Other Traditional Forest Dweller status

In order to protect their existing livelihoods and way of life, people in the villages affected by the proposed plant construction have applied for recognition of their status as Other Traditional Forest Dwellers, a category afforded special land rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (herein referred to as the Forest Rights Act, or FRA). This law (section II, 3a) provides the “right to hold and live in the forest land under the individual or common occupation for habitation or for self cultivation for livelihood.” Once such rights are recognized, gram sabhas become the custodians of the forest land, notably through the requirement that their consent be gained before any forest is diverted for other purposes (IHRC and ESCR-Net, 2013: 30). Government committees and other researchers have found documented and oral evidence that many of the villagers in the three affected gram panchayats fit these criteria (Pingle et al., 2010: 29-30; IHRC and ESCR-Net, 2013: 30; Saxena, 2010: 104-105; Saikia, Arupjyoti et al., 2010: 4). For reasons of necessity related to their dependence on the forest and its products as well as its important role in protecting against the worst effects of cyclones, these families have been custodians of the forest with a vested interest in safeguarding its ecological uniqueness, demonstrated through their active participation in forest protection and renewal programs over decades (MZPSG, 2010: 48). Nevertheless, the Government of Odisha and POSCO state that there are no Other Traditional Forest Dwellers (OTFD) in the affected area, and have consequently acquired approval from MoEF to divert the forest for non-forest purposes without the villagers’ consent (POSCO-India – FAQs 2015a; Pingle et al., 2010: 2-3). This is problematic, given that two MoEF committees found that the local government had deliberately obstructed efforts by the affected communities to have their claims to OTFD status processed (Saxena, 2010: 104-105; Saikia, Arupjyoti et al., 2010: 4; Pingle et al., 2010: 29-30). This is discussed in more detail below.

Inadequate consultation and no consent

Our interviewees and other research suggest that affected communities first learned about the project through media reports and the presence of unfamiliar Koreans and government officials from IDCO in their villages (IHRC and ESCR-Net, 2013: 28). Since, then, formal consultations have only taken place

through two channels. The first is the public hearing mandated by the MoEF regarding environmental impact assessments, and convened by the Orissa State Pollution Control Board on 15 April 2007. Under Indian laws and regulations, this should be the primary channel for formal consultation regarding the project. This hearing was held in Kujanga, not only inaccessible in terms of both time and money (loss of wages) for affected villagers but a stronghold of Biju Janata Dal (BJD) the ruling party in State government, and major supporters of POSCO. Multiple reports suggest this consultation also took place in an environment of fear, as the government deployed several platoons of armed paramilitary forces in the district in the days leading up to the hearing. Multiple accounts also state that there was no opportunity to discuss the social impact of the assessment (IHRC & ESCR-net 2013:29; Pingle et al 2010:9; MZPSG 2010:5; Asher 2009: 21-23).¹⁴

The second formal meeting between some community members and POSCO (though it is based on a presumption of consent) is the Rehabilitation and Peripheral Development Advisory Committee of village representatives and government, convened by government, which engaged in consultations regarding compensation in 2006 and 2010 (POSCO-India –2015a). As mentioned above, there is evidence that the majority of the affected families have not agreed to this compensation package and instead maintain opposition to the project in its entirety. This has been expressed through PPSS non-violent direct actions, as well as through gram sabha resolutions from all three panchayats indicating rejection of the project.¹⁵

Since the signing of the MoU, POSCO states that it has engaged in continuous consultation with affected communities. On its website, POSCO India indicates that some informal consultation practices have taken place regularly, including 188 mass meetings, 1,399 individual meetings, and staffing of a public office in Kujanga with display panels and information boards to further explain the project to the community (POSCO-India 2015a). The company also states it engaged in an ‘intensive awareness campaign’ including leafleting and local newspaper advertisements, after signing the MoU (POSCO-India 2013a: 4). To our knowledge, the only formal social impact assessment that has taken place has

¹⁴ The National Green Tribunal found that the hearing was held at a time in which a new regulation (EIA Notification 2006) was replacing an old one (EIA Notification 1994), and that the public hearing was held in accordance with the (weaker) regulations outlined in the older Notification. If the environmental clearance application had been made after 13 September 2007, it would have been held to higher standards, which include the provision of a social impact assessment, whereas the 1994 Notification requires only a description of the number of villages and population to be displaced, and a ‘Rehabilitation Master Plan’ (NGT 2012: 15-16). The Orissa State Pollution Control Board and MoEF nevertheless argued, in their case at the NGT, that they had followed the more rigorous 2006 Notification. The Court did not entertain this argument as they were not technically required to follow the 2006 Notification.

¹⁵ The first gram sabha resolutions (Gobindapur, Dhinkia and Nuagaon) were in March 2008, immediately after implementation of the Forest Rights Act under which such a resolution constitutes veto power if OTFD status is recognized; the second (Gobindapur, Dhinkia and Nuagaon) was passed in February 2010, after the Ministry of Environment and Forests granted ‘final’ forest clearance on the condition that no rights were outstanding under the Forest Rights Act; the third (Gobindapur and Dhinkia) were in February 2011, again after the MoEF again issued clearance on the condition that no rights were outstanding under the Forest Rights Act; the fourth (Dhinkia) was in October 2012; and the fifth (Dhinkia) in September 2014 (IHRC and ESCR-Net, 2013: 30-31; Roy et al., 2013; MZPSG 2010:8,15; PPSS, 2013, 2014; Forest Rights Act, 2010).

been a report commissioned by POSCO and conducted by the Xavier Institute of Management, however this report has not been made public. To our knowledge, there has not been a human rights impact assessment.

POSCO states on its website that the compensation committee (Rehabilitation and Peripheral Development Advisory Committee) meetings, and the regular mass and individual meetings it holds in Jagatsinghpur constitutes human rights due diligence (POSCO-India 2015a). This does not meet the standards outlined in the UN Guiding Principles, which require drawing on internal and/or external human rights expertise, and engaging in meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation (UNOHCHR, 2011: 19).

Government sponsored violence, intimidation and questionable criminal charges

Throughout the course of the conflict between POSCO and anti-POSCO community members, violence, intimidation and the use of criminal charges as a means to suppress opposition have emerged as additional human rights concerns. As early as 2005, not long after the signing of the MoU, villagers reported that 'henchmen' or 'goons' hired by POSCO began to visit the area and harass people (IHRC & ESCR-net 2013:41). In response, villagers sought to protect their communities by erecting a barricade to prevent officials from government and POSCO entering the village to prepare for land acquisition (MZPSG, 2010: 18). Since then, media and human rights groups have reported repeated instances of violence and intimidation, the most significant being:

- In November 2007 a large group of people (up to 500) stormed the site at which villagers were engaged in a peaceful dharna (protest), after which the police were able to enter the area previously blockaded by the villagers. Dozens of people were injured. Over the following weeks police remained stationed in the area, occupying public buildings such as schools (MZPSG, 2010: 19-20). Dr. BD Sharma, Ex-commissioner for Scheduled Castes and Scheduled Tribes, after visiting the area in December 2007, described it as being 'under siege', and criticized the police for preventing movement of people and essential goods into and out of the village. He commented that "The presence of the police ensures that no one from the village moves out to unite with those who could not hold out against the administration in the neighbouring villages" (Menon and Das 2008).¹⁶
- In May 2008, 100 people were arrested and up to 20 injured when police used teargas and batons to disperse a protest (Ceresna, 2011: 23; Amnesty International, 2011).
- In June 2008, anti-POSCO villagers were returning from clearing a waterway blockage to find a large group of 'goons' (up to 60). Villagers were attacked with multiple weapons, including

¹⁶ See also Sharma et al. (2008).

bombs, one of which resulted in the death of Dula Mandal, while several others were injured. The attackers hid in a building surrounded by the villagers until the police arrived, some 24 hours later (MZPSG, 2010: 20; IHRC and ESCR-Net, 2013: 42).

- In May 2010, police confronted peaceful protesters conducting a dharna at Balitutha with rubber bullets, tear gas and batons (PPSS 2012; Economic Times 2010; Hindustan Times 2010; IHRC and ESCR-Net, 2013: 37). An independent government fact-finding mission found that over 100 were injured, some critically. The leader of this mission, retired Justice H. Suresh of the Bombay High Court, stated that “Everywhere in this country whenever people demand justice, they get police lathis (batons) and oppression” and demanded the immediate cancellation of the POSCO project (New Indian Express, 2010).
- In February 2013, officials from IDCO and POSCO-India commenced land acquisition through the cutting down of betel vines and trees in the Gobindapur area. The officials were supported by between 120 and 200 police who entered the village at 4am, attacked protesting villagers with batons, injuring at least 12 people and, according to video testimonies, sexually assaulting women. The protestors continued to barricade their villages, forcing the police to withdraw and land acquisition to cease after five days (IHRC and ESCR-Net, 2013: 40; Senapati and Pradhan, 2013; Amnesty International, 2013; Samadrusti Televisions, 2013a). IDCO confirmed that POSCO-India staff were officially part of the land acquisition team, and media reported that S N Singh, General Manager Construction, POSCO India said “We are helping the administration in guiding them on the GPS system to determine the boundaries” (Baisakh, 2013).
- On 2 March 2013, a home-made bomb exploded in Patna village, killing three men, Manas Jena, Nabin Mondal and Narahari Sahu, and critically injuring another, all of whom were anti-POSCO protesters. Police took 16 hours to respond, and before visiting the area reported to the media that the men died while making the bomb, on the basis of claims from a pro-POSCO villager who was not present at the site during the incident, and despite multiple claims to the contrary from people who were (IHRC and ESCR-Net, 2013: 42; Engineer et al, 2013; Samadrusti Televisions, 2013b).

The human rights violations suffered by villagers as a result of this climate of insecurity extend beyond immediate harm to associated violations of the rights to health, education and work, as villagers’ freedom of movement and access to state services is limited (IHRC and ESCR-Net, 2013: 53). Local activists have accumulated significant evidence of this violence in the form of video footage and still photographs, some of which show POSCO officials accompanying state agents who direct the violence.¹⁷

¹⁷ Copies on file with author and available on DVD upon request via <http://www.samadrusti.com>

POSCO's response to these episodes of police violence has been to contest the account of events offered by PPSS and other villagers (IHRC and ESCR-Net, 2013: 78-79; POSCO 2012). POSCO India has sought to portray the movement and its supporters as 'miscreants' and the violence as initiated by PPSS against pro-POSCO villagers (POSCO, 2012). When POSCO has spoken out against violence in the area, it has been to request more police presence to maintain law and order and "protect innocent villagers from brutal violence by the PPSS" (POSCO 2012).

Human rights researchers suggest that police have also systematically targeted anti-POSCO community members through "arrest and detention based on false or inadequately investigated criminal charges, the use of 'others' as a catch-all group on charging documents, the link between protest activities and arrests, and over-reliance on pre-trial detention" (IHRC and ESCR-Net, 2013: 45; Alternative Law Forum, 2013). The repeated arrest and detention of PPSS leader Abhay Sahoo and other leaders, as well as the proliferation of criminal charges, have added to the repression of opposition to the project in the area. To our knowledge, there has been no attempt to systematically address this human rights issue, and it remains a serious barrier to villagers' freedom of movement.

Environmental risks

The proposed POSCO project also entails significant environmental risks. Environmental activists and affected communities have expressed their strongest concern over the project's impact on water. The MoU provides for "drawal and use of water from the Mahanadi barrage at Jobra in Cuttack or any other suitable source for construction and operation of the Overall Project" (MoU 7(i)). This will affect potable water supplies for nearby cities of Cuttack and Bhubaneswar, and irrigation for the districts of Cuttack, Jagatsinghpur, Kendrapada, and Khurda (IHRC and ESCR-Net 2013:15). Villagers are concerned about the impact of the project on fish and shrimp breeding areas in nearby estuaries and the mouth of the Jatadhari river (IHRC and ESCR-Net 2013:15). This is of particular concern to villagers who depend on pisciculture for their livelihood, as they have only informal and therefore unprotected rights to that form of livelihood and associated protection of the necessary ecology (MZPSG 2010:60-63). In addition, concerns have been raised regarding the impact of deforestation and destruction of sand dunes on vulnerability to cyclones, the impact of industrial waste on local ecology, and the risks posed to marine birds and the endangered Olive Ridley turtles (Ceresna 201:17; IHRC and ESCR-Net 2013:15-16; Saldhana and Rao 2011).

Pro-POSCO villagers

Though the protest against POSCO has been vigorous, well organized and widespread in the affected area, there are also a number of villagers who support the project.¹⁸ The most visible of the pro-POSCO

¹⁸ The polarization and heightened tensions surrounding the POSCO project make it very difficult to independently verify how many of the affected people support the POSCO project, compared to those that oppose

villagers, as they are known, are 52 families formerly residing in the POSCO transit camp, located on the road into the affected area. These families reportedly left their villages when tension emerged between them and anti-POSCO villagers (Asher, 2009: 23; Mishra, 2014; POSCO-India 2015a). The company provided financial support to the camp, providing water, electricity, some housing, and paying the families a small stipend for their livelihood, with a view to returning them to their villages when safe to do so (POSCO-India 2015a). Human rights researchers have condemned the conditions in the camp as sub-standard, and violating the residents' rights to adequate housing, food, water, health, work and education (IHRC and ESCR-Net, 2013: 53-55). These conditions and the economic dependence on POSCO are a stark contrast with the self-sufficiency these families enjoyed before their move to camp (IHRC and ESCR-Net, 2013: 63), where though they may have considered themselves poor, they did live above the poverty line (Aleaz, 2011: 53-55), and where they enjoyed a high degree of community cohesion that has now been eroded (IHRC and ESCR-Net, 2013: 62).

These families may support the project because they stand to benefit from the compensation package, though one study found that their expectations regarding compensation were unrealistically high (Aleaz, 2011: 53-55). Given the poor conditions that have prevailed in the transit camp, many of these families have now returned to their villages and their trust in POSCO and the promised compensation package has reportedly been eroded (IHRC and ESCR-Net, 2013: 6, 68; Mishra, 2014). In interviews, PPSS argued that many of those who appear to support POSCO are landless labourers whose support is based on fear of retribution from landlords who have a vested interest in the project because of the greater benefits of compensation. In addition to the 52 families in the transit camp, some other pro-POSCO groups have also formed to counter the activities of PPSS, the most prominent of these being the United Action Committee, which has represented the pro-POSCO contingent of the community in negotiations regarding compensation (Pattnaik, 2011: 61).

Resistance and access to remedy: contesting development and human rights harms

The human rights issues described above are a complex amalgam of threat, risk, and past and ongoing harm, which makes it difficult to interpret this case through the UN business and human rights framework of 'respect, protect, remedy' (UNOHCHR, 2011: 1). The 'protect' and 'respect' pillars of the business and human rights framework pertain quite clearly to a 'pre-harm' stage, while 'remedy' suggests a clear 'post-harm' stage. With its origins in tort-law, the notion of remedy implies that the

it. Both sides accuse the other of misrepresenting the support or opposition to the project, and indeed support and opposition fluctuate over time. It is not the intention of this report, however, to make a determination on this point. Rather, our concern is to analyse the redress options available to those who do harbor grievances related to the POSCO project

harm has occurred in the past, and that it can be remediated – often by compensation – which will resolve the grievance.

In fact, it is quite difficult in the POSCO case to untangle the human rights concerns in a way that is commensurate with this framework. Instead, the combination of forcible land acquisition, inadequate consultation, lack of consent, and violence and intimidation, is better described as a web of concerns, risks, threats and harms. In this context it is difficult to establish which aspects of the communities' grievances call for 'protection' and 'respect' and which call for 'remedy'.

Part of the reason for this is that the grievance that lies at the heart of this dispute is one that exceeds the human rights framework, and might better be described as a conflict over competing ideas of development, and who gets to define development. It is within this context that human rights concerns arise, but the conflict is not limited to only human rights concerns. The case also raises concerns for the affected communities and their supporters about environmental sustainability, cultural preservation and autonomy, livelihoods, and, most centrally, the power and authority to set development agendas. As one activist articulated it in an online interview in April 2015, "The development model that you are trying to impose on us is not acceptable. You want to talk about responsible mining, but we say no. Let us talk about development of people [first], and how mining will contribute to it." By articulating their grievances in such broad terms, the anti-POSCO movement and its supporters include human rights issues – past harms and future threats – but also seek to scrutinise the broader conditions that produce these human rights concerns.

The POSCO case is therefore characterized by a multiplicity of actors, strategies and tactics for both *resisting* land acquisition and the construction of the steel plant, and *seeking remedy* for harms that have already taken place, primarily to do with violence, intimidation, dubious criminal charges, and the land acquisition that has occurred to date (See Table 2). Rather than conceive of these efforts as only seeking access to remedy, this report takes the approach *that resistance and remedy are largely indistinguishable* from each other in this case. The following analysis of strategies and mechanisms engaged by anti-POSCO groups therefore evaluates them in light of what they have achieved in terms of enabling both resistance and access to remedy for human rights harms. Where appropriate, the report expands its focus to also encompass methods through which the anti-POSCO communities and their supporters contest the broader development paradigm that generates human rights concerns.

Table 2: Avenues of resistance and remedy

Mechanism	Use	Impact
OECD NCPs	Complaint to Korean NCP regarding POSCO, and Dutch and Norwegian NCP regarding pension fund investments in POSCO.	Dutch NCP attempted to facilitate fact-finding mission and dialogue with no success.
Domestic legal and regulatory processes	Multiple challenges to forest and environmental clearances (to NGT) and land acquisition (to Odisha High Court).	Privately owned land excluded from POSCO's plans. Multiple suspensions and reconsiderations of environmental and forest clearances, significantly stalling project.
Domestic political mobilisation	PPSS engage in non-violent direct action campaign for 10 years.	Significantly stalls project; attracts some political attention; generates time for other avenues to be pursued.
Transnational civil society mobilisation	European, Korean and US civil society groups campaign against POSCO, draw attention to the project's negative impacts, write research reports and target investors.	Provide counter-information to the contested accounts from POSCO and government about project's impacts; generate negative publicity for POSCO in international arena

Legal and regulatory avenues

The POSCO project is situated in a regulatory and legal framework comprised of multiple state and federal laws and regulations. Consequently there are numerous channels through which opponents of the project have submitted complaints. Reflecting the institutional foundations of these forums and the norms they are mandated to enforce, the cases brought before these forums have been technical in nature, often challenging the process through which authorisations have been granted. However, the complainants are typically motivated by a deeper objection to the project on ideological, environmental or social grounds.¹⁹ These cases have made the most direct impact on addressing the rights concerns of communities as they relate to land acquisition, albeit often in a technocratic way, and without resulting, so far, in any legal judgments that categorically prevent the project's progress.

¹⁹In addition to these cases from affected villagers, two Odisha High Court cases were filed by other companies claiming first rights to the prospecting licences for the Khandadhar Hills. These are discussed further below.

Forest clearance

At the heart of the grievance associated with the clearance for diversion of forest land is that claims to Other Traditional Forest Dweller status, and therefore land rights under the FRA, had not been settled at the time clearance was granted, and remain unsettled today. The MoEF issued initial forest clearance on the advice of its Forestry Advisory Committee in August 2007. After a series of standard (at the time) reviews by the Supreme Court, the MoEF issued the final clearance in December 2009, subject to clarification that the approval was conditional on the settlement of any rights owing under the FRA (MoEF, 2011a: 1). A series of regulatory and legal challenges ensued.

Two government committees gave the opinion that the Government of Odisha was in violation of the FRA because it had not settled what the committees judged to be valid claims to OTFD status of people in the affected area, despite their applications (IHRC and ESCR-Net, 2013: 31; Pattnaik, 2011: 62), or taken due account of the gram sabha resolutions rejecting the forest diversion.²⁰ This view was shared by both the Saxena committee, convened by the MoEF and the Ministry of Tribal Affairs to review the implementation of the FRA across India (Saikia, Arupjyoti et al., 2010: 4-5; Saxena 2010: 42), and the majority of the Meena Gupta committee, which was subsequently convened specifically to look into implementation of the FRA at the POSCO site. The majority Meena Gupta report went on to recommend that the forest clearance of December 2009 and the two environmental clearances (for plant and port) of May and July 2007 be revoked (Pingle et al., 2010: 5,10,12).²¹ The Forest Advisory Committee, an expert advisory committee of the MoEF, also expressed ambivalence, recommending a 'temporary withdrawal' of the forest clearance in response to the Saxena and majority Meena Gupta majority reports (Sethi 2010).

Nevertheless, the MoEF has accepted the affirmations from the State Government that there are no outstanding OTFD claims in the area. In response to one gram sabha resolution contesting this claim, the Odisha government responded with a strongly worded letter to the MoEF, declaring that the resolutions were illegal as they failed to comply with the provisions of the Orissa Gram Panchayat Act (1964) and FRA and should therefore be considered fakes. Further, the letter declared that the sarpanch of Dhinkia, Shri Sisir Mohapatra, had misused his position to serve the interests of PPSS, of which he was secretary, and should be subject to legal action for violations of the Odisha Gram Panchayat Act (MoEF, 2011b: 1). In May 2011 the national Minister for Environment and Forests, Jairam Ramesh, declared that it was the responsibility of the state government to implement the FRA and therefore, if the Odisha government was satisfied that its terms had been complied with, forest clearance was granted (Times of India, 2011). Given that its MoU with POSCO commits the Odisha

²⁰ See footnote 15 for details of gram sabha resolutions.

²¹ The Meena Gupta Committee issued two divergent reports. The majority report, from 3 of 4 members (excluding Meena Gupta), was more critical. The National Green Tribunal (2012) later gave the opinion that the majority Meena Gupta committee report exceeded its terms of reference in making this recommendation, as it was not asked to comment on the legality of the clearances.

government to facilitating all the necessary clearances, this delegation of responsibility by the federal government creates a significant conflict of interest for the state government.

At the time of writing, the felling of trees in the area is being contested in the NGT on technical grounds: the state government is required to issue a validation for the final MoEF clearance before tree felling commences and has not yet done so. The NGT ordered that the State Government publicly issue such a validation before any more trees are felled (Mohanty 2013), which it has so far, to our knowledge, failed to do. Tree felling has therefore ceased, but this could also be explained by the lack of security regarding the iron ore supply from the Khandadhar Hills (discussed below). Once a final validation is issued, the forest clearance becomes vulnerable to further challenge on the grounds raised by the Saxena and majority Meena Gupta committees: that claims to OTFD status remain unresolved.²² Legal teams from the Indian legal NGO LIFE (Legal Initiative for Forests and Environment) are working on this case.

Environmental clearance

In 2007, the MoEF granted POSCO environmental clearances for the port (in May), and the steel plant (in July) in a manner described by the National Centre for Advocacy Studies as ‘non-transparent’ given the insufficient time between mandatory public hearings and the grant of the clearance (Asher, 2009: 26). While the initial grievances focused on the forest clearances, the Saxena and Meena Gupta committees also identified serious flaws in these environmental clearances. The majority report of the Meena Gupta committee stated that “such mechanical clearance makes a mockery of rule of law and procedural safeguards” (Pingle et al., 2010: 9). These findings, and the creation of the new NGT, paved the way for opponents of the project to make use of the regulatory and legal channels associated with environmental, rather than forest, clearances, a strategy that continues to stall the project’s environmental clearances today.

In early 2011, Prafulla Samantara of Lok Shakti Abhiyan, a Bhubaneswar-based anti-displacement activist group, filed a complaint to the newly formed NGT arguing that the entire project appraisal was conducted contrary to the letter and spirit of the environmental assessment regulation, Environmental Impact Assessment (EIA) Notification 2006, issued under the Environment (Protection) Act (1986). He argued that the MoEF and its Expert Appraisal Committee (responsible for technical judgments) had relied mainly on the assurances of POSCO, and that this cast into doubt their conclusions (NGT, 2012: 4-5).

In March 2012, the NGT handed down its verdict. The NGT found that legal opportunity to appeal the original 2007 clearances had passed, and the Tribunal was therefore limited to handling the aspects of the appeal that relate to the additional conditions imposed in the ‘final order’ for environmental

²² The Forest Department conducted only an aerial survey, which LIFE argues is inadequate. The challenges would also raise once again the resolutions of the gram sabhas opposing the project, and the outstanding applications for OTFD status of affected residents.

clearances, issued in 2011. In relation to these conditions, the NGT ordered their suspension and directed the MoEF to review the clearance process afresh and attach conditions and a timeline (NGT, 2012: 31-32). However, the NGT took the opportunity, in the ruling, to criticise a number of aspects of the environmental clearance process, and to encourage the MoEF to establish more rigorous policies to combat these issues. In particular, the Tribunal criticised the inclusion of Meena Gupta on the FRA review committee (on the grounds that she was Secretary of the MOEF at the time the initial clearances were issued); the scientific rigour of the EIAs; and the processing of EIA applications in a piecemeal manner, rather than treating the entire 12 MTPA project and associated infrastructure as a whole (NGT, 2012). It is also notable that the public hearing was deemed compliant not with the more rigorous 2006 EIA Notification, but rather with the less rigorous EIA Notification 1994, as the EIA fell within a transition period between the two (NGT, 2012).

In response to this order, the MoEF convened the 'Roy Paul' committee to once again review the clearances, this time limiting the review to the new conditions imposed in the 2011 final order. The report consequently made a series of technical recommendations requiring further environmental studies, and sought to clarify some of the ambiguities in the earlier assessments, notably around the planned capacity of the project and plans for future expansion (Paul, 2012). In relation to 'resettlement and rehabilitation', the report commented that "there was a general feeling that the project proponent had not done enough to gain the confidence of the local people by funding local development plans", and this may be because POSCO was unwilling to make such investments in the absence of a guarantee from the state government regarding the project (Paul, 2012: 25), meaning a guarantee of land acquisition and iron ore access, both which had exceeded the timelines outlined in the MoU.

By May 2013 POSCO had responded to the concerns of the report of the Roy Paul committee (POSCO-India 2015a). In January 2014 the MoEF granted POSCO's request for the revalidation of environmental clearance for a 4MTPA plant (originally granted in 2007), retrospectively revalidating the clearance for a period of five years from 18 July 2012 (Dash, 2013). The revalidation was subject to the recommendations of the Roy Paul report (MoEF, 2014). It covers only the initial 4MTPA phase of the steel plant and captive power plant, and neither the mine nor the port (Mohan, 2014). Consequently, though the clearances have therefore been determined technically and legally valid, this revalidation does not address all the concerns raised by the NGT in its judgment, particularly regarding the piecemeal nature of the clearance, and nor does it address similar concerns raised by the majority Meena Gupta committees regarding the public hearing (Pingle et al 2010). The widespread government pressure on the MoEF to issue the relevant clearances is revealed in minutes of a Ministry of Steel meeting, that lament the delays in the clearance, stating that, "This EC [environmental clearance] should be revalidated immediately to avoid unnecessary noises raised by NGO and anti-project entities etc during the implementation of land acquisition by GoO" (Ministry of Steel 2013: 1).

Prafulla Samantara filed a further case with the NGT challenging the 2014 revalidation of the original

2007 environmental clearance. This case argued that both the 2007 clearance and 2014 revalidation had neglected ground reports submitted by experts (Business Standard, 2014). This case is ongoing at the time of writing.

Land acquisition

In 2009 two cases were filed in the Odisha High Court by affected villagers. The first case challenged POSCO's acquisition of 438 acres of *private land* for public purposes. The Odisha High Court accepted the petitioners' evidence that because POSCO, a private company, had paid for the land, the public purpose argument was invalid and the land acquisition was therefore not compliant with the Land Acquisition Act (1894)(case no. 14884). The Odisha government subsequently withdrew its plans to acquire private land, which in any case represented a small part of the total land, and the Court therefore dismissed the case. This case is important because it has brought about, albeit indirectly rather than through a categorical legal judgment, a reduction in POSCO's plans for land acquisition. However, the reduction is relatively small and unlikely to ultimately stop the project. For this purpose, a second petition was filed at the same time as this one.

The second petition (case no. 14885), challenged the project's compliance with the FRA's provisions protecting the rights of Other Traditional Forest Dwellers. In this case, the High Court refused the petitioners' request for an interim stay on tree felling, but did not entirely reject their case, which is ongoing but has not been listed for hearing for a number of years. The judgment regarding the interim stay notably made reference to there being a public interest in the project owing to its projected economic benefits, which include 'provid[ing] employment to 30,000 people and [...] huge generation of revenue through excise, customs duty VAT and income tax' (Orissa High Court, 2011: 29). The Odisha High Court has thus exhibited some ambivalence in its findings on the POSCO case. In the private land case, the interim order concedes some land rights to villagers; but in the forest land case the Court has declined to protect the potential OTFD rights, instead supporting the Odisha state government's objectives to bring about economic growth through industrialization.

Domestic political mobilization: Anti-POSCO People's Movement (PPSS) and its supporters

Domestic political mobilization, particularly at the site of the proposed plant in Jagatsinghpur, has played as important a role in resistance to the POSCO project as the judicial and regulatory appeals, though in a different way. The on-the-ground opposition has acted as a physical hurdle to land acquisition for government and POSCO officials. Meanwhile, supporters of the movement have played key roles in provisioning alternative information; acting as intermediaries between the movement and international supporters; and lending the POSCO case political capital as part of a broader narrative about major political parties' neglect of the marginalized, rural poor. As with the legal and regulatory avenues for expressing resistance, this domestic political mobilization has not, alone, brought about

rights protections, but it has contributed to the stalling of the POSCO project and therefore to mitigating the human rights risks associated with land acquisition about which villagers are concerned.²³

Formed within weeks of the signing of the POSCO MoU, the PPSS is a people's movement claiming to represent 80% of the people in the areas affected by the proposed POSCO steel plant in Jagatsinghpur, with Dhinkia panchayat the movement's consistent stronghold (Ceresna, 2011:20).²⁴ The movement is structured through village committees, an inter-village general council of 50 to 150 members (it changes over time), and a smaller core leadership group of approximately 10 people responsible for urgent decisions, led by the movement's chairman, Abhay Sahoo, who is a member of the Communist Party of India (CPI) (Pattnaik, 2011: 54; Interview with Prasant Paikray, spokesperson PPSS, Bhubaneshwar, December 2012; Interview with Abhay Sahoo, leader PPSS, Jagatsinghpur, December 2013). Members of PPSS make small financial contributions to the movement to sustain its activities, and participate in non-violent direct action protests. Day to day, members of the movement provide mutual support, for example through resolving conflict to avoid having to deal with the police, or through working on collective projects such as unblocking waterways, or preparing for cyclones (Pattnaik, 2011: 58; Interview with Prasant Paikray, spokesperson PPSS, Bhubaneshwar, December 2012). PPSS thus functions both as a resistance movement and a self-help movement that fills the gap left by a state that they see as promoting POSCO's interests over that of its citizens.

The movements' objective is to prevent the POSCO project from going ahead, and its strategy to achieve this objective is twofold: non-violent direct action, and a policy of non-engagement with the company or government on anything other than protection of their land rights. This is markedly different from many other corporate-community disputes, where communities may be willing to engage with a corporation to bring about better benefit sharing.²⁵ This highly adversarial strategy has been a key feature in the polarization and duration of this conflict.

After some initial attempts to engage with the government of Odisha, which did not contribute to PPSS' objectives, the movement adopted a policy of refusing to engage with the government, the law or POSCO on matters that pertain to anything other than protecting villagers' land rights.²⁶ Abhay Sahoo explained, "the policy that is being pursued by the government, and the policy for which we have been resisting, are two parallel policies. They cannot meet together" (Interview with Abhay Sahoo, leader PPSS, Jagatsinghpur, December 2013). He went on to explain his concerns about using the law:

²³ For a film summary of this resistance, see MZPSG 2012c.

²⁴ PPSS maintains ties with people in other affected areas, particularly the Khandadhar Hills where the proposed mines are located, but the strongest movement there has established itself as separate from party influences (Asher, 2009: 20; Odisha Sun Times, 2014).

²⁵ See other cases in this series: Wilmar, Weda Bay.

²⁶ PPSS leadership met with Odisha Chief Minister Naveen Pattnaik in 2010. The Chief Minister promised to visit the site to better understand the concerns of the affected communities, but his visit never took place (Das, 2010).

“once you move the court of law, [that] means the movement is finished. [...] You see if the apex court gives direction which is opposed to the movement, like the high court commenting on my bail, ok I think people will start losing confidence on the movement. [...] Number two, you cannot take the judiciary for granted because judiciary, off and on, is a parcel of the government’s mechanism. The government’s industrial policy cannot be changed by the court of law.”

The movement therefore refuses to engage with government in relation to land acquisition efforts, such as surveying or promoting compensation packages. Its engagement with the government and the law is limited to demanding rights under the Forest Rights Act in the form of filing claims for OTFD status, and advocating rejection of the project in the gram sabhas.

The second element of PPSS’ strategy, non-violent direct action tactics, has been key to obstructing land acquisition efforts in Jagatsinghpur. One of PPSS’ most effective strategies, adopted as early as September 2005, three months after the MoU was signed, has been to physically blockade the area, often with women and children (Samadrusti Television, 2011; See Figure 1). Originally this was to prevent officials from entering the area to survey and to provide information about proposed compensation to villagers and persuade them to support the POSCO project. As the conflict between the villagers, and the government and POSCO escalated, the barricades, blockades and checkpoints served also to prevent police entering the area to make arrests or harass villagers (Ceresna, 2011: 21; Pattnaik, 2011: 56-59). Blockades of this kind have been in place on and off ever since. The persistence of villagers to sustain these blockades, through multiple incidents (described above) of police charging at blockades with batons and injuring non-violent protestors, played a crucial part in the government’s literal inability, over many years, to acquire the land that POSCO seeks.

Figure 1. Anti-POSCO People’s Movement Protests, June 2011²⁷



In addition to on-site non-violent direct action, PPSS organizes and engages in broader protests. PPSS supports other anti-displacement peoples movements, for example by participating in a seven day

²⁷ Source: PPSS personal communication.

march to the controversial proposed Vedanta University site near Puri (Ceresna, 2011: 21-22), and in return receives the support from other people for its own protests, such as those held every year on 'Black Day', 22 June, to commemorate the signing of the MoU (The Hindu, 2014).

PPSS liaises with more formal organisations, such as NGOs, legal activists or journalists, to take advantage of their technical expertise and networks. Other organisations can make their own decisions regarding their strategies and tactics, which, by engaging the law and other more formal channels, are complementary to non-violent direct action and non-engagement. However, PPSS operates on the principle of solidarity, constituted by a strict policy of non-interference from outside organisations in PPSS' internal matters (Interview with Prasant Paikray, Spokesperson PPSS, Bhubaneswar, December 2012). The movement expects supporters to communicate their strategies with them, and to ultimately defer to the aspirations decided by the movement (for example by not encouraging villagers to consider negotiating on compensation). PPSS' supporters are accustomed to working in this fashion, and have done so for many other movements, including for the anti-Vedanta movement. These supporting organisations have engaged in a number of different strategies to campaign against the project, including providing legal support, establishing and sustaining a vibrant alternative media and news source that covers events relevant to POSCO and other similar cases, and conducting research and advocacy. Of all the groups involved in the anti-POSCO campaigns, it is Odisha-based groups that play the most important role in enabling access for outsiders to information about PPSS' struggle, and acting as intermediaries between the movement and international supporters, researchers and journalists.

Box 3: Some of PPSS' closest supporters and their key activities²⁸

- **Lok Shakti Abhiyan:** a loose network of anti-displacement activists, headed by Prafulla Samantara at the Odisha state level, and connected to the National Alliance of People's Movements, founded by Medha Patkar of Narmada Bachao Andolan. Lok Shakti Abhiyan supports non-violent direct actions and engages in more formal avenues of campaigning such as the OECD NCPs and legal cases to the Odisha High Court and the NGT. This group was also heavily involved in the Vedanta case (Lokshakti Abhiyan, 2015).²⁹
- **Legal Initiative for Forests and Environment (LIFE):** activist lawyers advancing "environmental democracy" through litigation, campaigns and capacity building to help people protect areas of ecological importance. LIFE lawyers have provided legal counsel for the cases taken to the NGT regarding POSCO.

²⁸ Many of these organisations asked not to be named in this report out of fear of negative consequences from the State and National governments.

²⁹ See also Vedanta case study report in this series.

A more uncertain and intangible effect of the domestic mobilization around POSCO relates to its place as part of a broader constituency of scheduled castes, scheduled tribes, farmers and environmentalists (Baviskar, 1997). These groups have come to constitute a 'vote bank' to which even India's major parties are responsive, particularly Congress, one of India's two biggest political parties (Breeding, 2011). For example, the people's movement contesting Vedanta's mining plans in Niyamgiri, home to the Dongria Kondh tribal people, was championed by Rahul Gandhi, chairman of Congress, a move described in the media as an attempt to win (back) the 'tribal vote' - 8% of the population nationally (Patnaik, 2010). The POSCO case has not attracted political attention of the same scale, but there is speculation that the silence or equivocation of parties like Congress at the state level, when they might be expected to support such significant investment in the state, is in order not to alienate this constituency (Mishra and Nayak, 2011). The continued vocalization of opposition to POSCO by civil society groups at the local and state levels, in particular, is essential to the integration of this campaign into broader narratives about marginalization of certain groups, and therefore to the maintenance of the movement's political capital and leverage. Given the uncompromising support for POSCO from the ruling BJD party at state level, this leverage is unlikely to be as successful as the Dongria Kondh's in the Vedanta case, but it has likely contributed to the delaying of the project in small ways, for example through slowing land acquisition activities in the lead-up to 2014 state election (Economic Times 2014).

Transnational civil society mobilization

The transnational civil society mobilization around POSCO's activities in Odisha has been characterized by sporadic expressions of opposition to the project by actors in Korea, the US and Europe. The effect of these various methods of campaigning, often disconnected from each other but prolific when considered together, is difficult to ascertain with any certainty. To date, they have not led to any divestment from the company, nor to any tangible changes in the behaviour of POSCO or the Governments of India or Odisha. However, they have had the effect of introducing POSCO to international standards and discourses regarding business and human rights. The ambivalent effects of POSCO's incorporation into these circles is discussed further below.

The organisations and individuals that support the anti-POSCO campaign are organized into overlapping but loose networks with each-other, all of which pivot around their shared relationships with India-based activists who support PPSS. Some of these groups have been started by Indian-born researchers, activists and academics who have since lived, studied and worked abroad, while others are Northern NGOs that have reached out to Indian groups and been connected to the POSCO case through civil society networks. See Box 4 for further details.

Box 4: Significant international organisations opposing POSCO's Odisha project

- **Mining Zone Peoples' Solidarity Network:** A US-based network of researchers working almost exclusively on the POSCO case, with a particular interest in the economic aspects of the project (MZPSG, 2015). Many of these researchers are Indian-born and have close relationships with Odisha-based activists.
- **ESCR-Net:** An organisation that acts as a hub for NGOs around the world working on economic, social and cultural rights. ESCR-net also engages more actively in a small number of cases that are emblematic of their priorities, one of which is POSCO (ESCR-Net, 2015). ESCR-net worked with the New York University (NYU) School of Law to research and produce the report 'Price of Steel' (IHRC and ESCR-Net, 2013).
- **NYU School of Law:** As part of the International Human Rights Clinic, NYU researchers researched and produced the report 'Price of Steel' with ESCR-net (International Human Rights Clinic, 2015; IHRC and ESCR-Net, 2013).
- **Korean Transnational Corporations Watch (in particular KHIS), SOMO, BothENDS, and ForUM:** see below – OECD NCP complaints

Efforts to raise the profile of the POSCO case through international campaigning have increased in more recent years as more organisations have become aware of the case, and as Bhubaneswar-based activists have increased their international networks. Though there have been occasional small street protests, for example at POSCO's AGM in Seoul (Wan, 2013), most international mobilization around this case has taken the form of more formalized research, publication of reports (IHRC and ESCR-Net, 2013; MZPSG, 2010), and soliciting of non-material support from influential actors and organisations, particularly within the UN (Odisha Development Review Collective, 2011), to exert pressure on POSCO. For example, in October 2013, eight UN Special Rapporteurs called on POSCO to halt the Odisha project citing human rights concerns (UNOHCHR, 2013b), and in May 2014 five of these Special Rapporteurs engaged the Special Procedures function of the UN Human Rights Council to require the government of Korea to respond to questions regarding how it is holding POSCO to account in Korea for the company's actions in India (Permanent Mission of the Republic of Korea to the UN 2014; UN Human Rights Council 2015). This has added the POSCO case to the many other high profile cases raised in global civil society discussions of land grabbing (Balagun et al., 2014), and has facilitated connections for anti-POSCO activists in Bhubaneswar with activists in other parts of the world. This kind of attention has thereby had important indirect effects on the sustenance of the anti-POSCO campaign, but little effect directly on

POSCO other than requiring the company to respond to allegations, which it consistently does so by denying any culpability in human rights harms.³⁰

One of the most important roles these transnational activists have played has been to provide support for research on the human rights situation in Jagatsinghpur. Foreigners are prohibited from visiting the site without government permission (Economic Times, 2012), and must face a 'siege-like' security situation if they attempt to visit (IHRC and ESCR-Net, 2013, p. 49). This makes it very difficult for outsiders to obtain reliable information about the status and nature of land acquisition, including the human rights harms alleged in association with that acquisition. Though Odisha-based activists have collected significant evidence of these harms, particularly through video, the state government and POSCO have consistently painted these activists as anti-industrialists with an agenda against POSCO, and have thereby tainted the credibility of their research in the eyes of the middle class and decision makers. When international researchers are able to verify the human rights abuses through independent (from POSCO or government) research, they are able to offer a crucial alternative account of the situation to intervene in perceptions of the project. Though the local government support may be too great for such research to intervene directly in Indian decision-making, it does contribute to building a broader picture of the problem that has, for example, drawn POSCO into the OECD NCP process.³¹

In addition, there has been some activism directed at POSCO's investors. The OECD NCP complaints, described in more detail below, were targeted not only at POSCO, but also at the Dutch and Norwegian pension funds, both of which hold minority investments in the company. In the US, 16 members of ESCR-net wrote to high profile private investors, including Berkshire Hathaway, JPMorgan Chase, Bank of NY Mellon, Deutsche Bank and Blackrock. These private financiers either failed to reply (Berkshire Hathaway and Blackrock); have argued that they have no leverage over POSCO because of technicalities related to the nature of their financial relationship (Bank of NY Mellon); or committed to ongoing dialogue with POSCO regarding the situation in Odisha (P Morgan Chase and Deutsche Bank)(IHRC and ESCR-net 2013:72-73).³² Mining Zone Peoples' Solidarity Network (MZPSG, 2012a, 2012b) and Countercurrents (Countercurrents, 2014), an Indian-based activist organization have run other, less directly targeted, divestment campaigns. To our knowledge, no investors have divested from POSCO as a result of these campaigns, and any impact associated with ongoing dialogue remains unclear. The impact of investor campaigning is explored in more detail below, in relation to the Dutch NCP.

³⁰ For example, see the press releases available on POSCO's own website (POSCO-India 2015d).

³¹ In the Vedanta case, independent research of this kind has had a slightly more direct impact on decision making in India, but this may be because it aligned with the political interests of some important political players, such as Minister of Environment and Forests at the time, Jairam Ramesh, who had already expressed their opposition to the Vedanta project. No such important players, other than Jual Oram (recently appointed Minister of Tribal Affairs) have expressed such objections to the POSCO project.

³² For the letters and responses, see <http://business-humanrights.org/en/letter-from-civil-society-groups-to-posco-investors-regarding-steel-project-in-odisha-india-and-company-responses> .

Other avenues

In addition to these major avenues, activists in India who are not direct members of PPSS but support PPSS' stance against POSCO have pursued a number of other avenues of redress, none of which have had a significant impact on the case. The National Human Rights Commission (NHRC) has visited the area twice, and both times expressed concerns about particular issues, once about schools being used as police barracks (NHRC 2011a), and once about private real estate companies speculating on nearby land for rehabilitation colonies (Business Standard 2012b). At other times NHRC has also issued more general recommendations to the Government of Odisha to respect human rights in its handling of land acquisition, in particular through appropriate resettlement and rehabilitation (NHRC, 2011b). In each of these cases, government has promised to respond to the recommendations but interviewees for this research report they have had no effect on the ground. A 2011 report of the National Commission for Protection of Child Rights found that living standards in the POSCO transit camp were sub-standard; that the police were using a school as a barracks; and that children's involvement in the PPSS blockades was negatively affecting school attendance. However, investigators also found (and were moved by their encounters with such students) that students unanimously chose to participate in the protest out of concern that without their land, their future would be reduced to a labouring class and therefore there would be no point in going to school.³³ According to interviewees, other similar complaints have been made to the National Women's Commission and the Scheduled Caste Commission, neither of which received a response.

Insofar as complaints have been made to the NHRC and other similar bodies, it has been as part of a broader strategy to pursue every available option, and a longer and broader campaign to strengthen human rights institutions, rather than out of any real hope of immediate redress.

OECD NCP process

The significance and effectiveness of the OECD NCP complaint must be understood within this broader landscape of avenues of resistance and redress. Domestic non-judicial mechanisms had almost no impact, and transnational civil society support very little. Domestic political mobilization and domestic legal and regulatory complaints were stalling the project, but neither of these avenues was likely to offer its conclusive termination, as the affected people and their supporters aspired to. At this juncture, after seven years of efforts to stop POSCO, human rights groups in India made the decision to attempt a new forum after being introduced to the opportunity at a local workshop held by OECD Watch.

³³ PPSS Leader Abhay Sahoo, the leader of PPSS, did not deny the impropriety of using children in such protests, and used the opportunity to get support from the Commission to argue that police brutality in land acquisition should cease so that such protests are not required (National Commission for the Protection of Child Rights, 2011).

In October 2012, Bhubaneswar-based group Lok Shakti Abhiyan, with international supporters (see Box 5, below) filed a complaint to the OECD NCPs in South Korea, the Netherlands and Norway. The complaint alleged that POSCO had not conducted due diligence or meaningful stakeholder negotiation regarding the human rights and environmental impact of its proposed project, particularly the required land acquisition, and had failed to seek to prevent or mitigate the human rights abuses committed by the Indian state in its violent efforts to acquire land for POSCO. The complaint also argues that NBIM (among the world’s largest investment funds) and ABP/APG, “should seek to prevent or mitigate the real and potential adverse impacts directly linked to their operations through their financial relationship with POSCO” (Lok Shakti Abhiyan, 2012). The complaint requested that the NCPs facilitate mediation between all parties, and carry out a fact-finding mission. Furthermore, the complaint requested that the pension funds should detail the steps they intend to take to prevent, “through their investments in POSCO, contributing to adverse impacts”, and that in doing so they publicly disclose minimum requirements for the continuation of investment, that is, consider divestment (Lok Shakti Abhiyan, 2012).³⁴

The complainants in this case were realistic about their expectations regarding the NCP process. Lok Shakti Abhiyan understood that not only is the Korean NCP unlikely to accept the complaint, but that even if it did, the process would be very unlikely to halt the POSCO project, given that NCP processes are about collaborative problem solving. The objective was, therefore, to use the NCP process to expand international solidarity networks and increase the attention of international audiences – particularly financiers – on the anti-POSCO campaign. The best possible outcome, from the complainant’s perspective, would be a fact-finding mission that could lend credibility to their statements regarding human rights harms and risks.

Box 5: Role of international groups in NCP complaints

- **SOMO (*Stichting Onderzoek Multinationale Ondernemingen / The Centre for Research on Multinational Corporations*):** SOMO is a key member of OECD Watch, which is a network of NGOs that monitor the activity of the OECD NCPs to enhance their role in protecting human rights and advancing the other goals of the OECD Guidelines. SOMO co-hosted a training program in Odisha in 2012 on how to use the OECD NCPs, at which time they met anti-POSCO activists. SOMO, with BothENDS, supported these activists with advice, particularly to Lok Shakti Abhiyan, in the development of the OECD NCP complaints, and represented them in the Netherlands in discussions with the Dutch NCP (SOMO, 2015).

Continues over page

³⁴ The Norwegian NCP clarified in its final statement that the pension funds do not ‘cause or contribute’ to human rights harms, but are rather ‘directly linked’ to them (Norwegian NCP, 2013: 40)

Box 5 (cont.)

- **BothENDS:** BothENDS is a Dutch NGO whose mission is to promote social and environmental sustainability through supporting local initiatives in developing countries, as well as campaigning for sustainability at national and international forums (Both ENDS, 2015). BothENDS is also a member of OECD Watch and was invited to be part of this case by SOMO, to provide additional advisory support. BothENDS thus works with SOMO in supporting Indian groups engaged in the NCP complaint with the NCP process in the Netherlands.
- **ForUM:** The Norwegian Forum for Development and Environment is a network of 50 Norwegian development, environmental, peace and human rights organizations, and a member of OECD Watch (ForUM, 2015). ForUM represented the NCP complainants in Norway, a relationship facilitated via OECD-Watch.
- **Korean Transnational Corporations Watch (KTNC-Watch):** KTNC-Watch is a network of Korean NGOs working on corporate accountability in relation to human rights, labour rights, and climate. The secretariat of KTNC-Watch was, from 2008 to 2013, held by the Korean House for International Solidarity (KHIS), a NGO that monitors and campaigns against Korean corporations committing environmental or social harms abroad (KHIS, 2015). Advocates for Public Interest Law has held the secretariat since 2014. KHIS had expressed solidarity with anti-POSCO activists in Bhubaneswar, as well as with PPSS, prior to the NCP complaint, primarily by campaigning against POSCO in Korea. KHIS provided specific support for the drafting of the OECD NCP complaint, for which they were the complainants' representatives in Korea, and general advice and guidance regarding the Korean NCP and POSCO for strategic purposes.

The European NGOs involved in this case shared the modest expectations of the Indian complainants in relation to outcomes in Odisha. Their objectives were, instead, to strengthen the international networks available to Indian activist groups, while at the same time strengthening the NCP process as an avenue for human rights redress. Experienced European NGOs associated with OECD Watch (predominantly SOMO from Fair Green and Global Alliance) suggested that complainants couple two NCPs known from experience to be proactive in their approach to human rights complaints, and inclined to actively facilitate problem-solving (the Dutch and Norwegian), with one 'weak' and inexperienced NCP known to be reluctant to accept human rights cases (the Korean) (cf. Oldenziel et al., 2010: 10).³⁵ The expectation was that the stronger NCPs would coordinate with the Korean NCP to simultaneously prevent early dismissal of the case in Korea, and to build the capacity of the Korean NCP to handle human rights cases. The second objective of the European NGOs was to test the NCPs' interpretations of

³⁵ Only one of 20 specific instances (complaints) filed with the Korean NCP has been accepted, as of April 2015 (personal communication, Korean House for International Solidarity, May 2015).

minority shareholder responsibilities under a new provision in the 2011 OECD Guidelines which states that “If the enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible” (OECD, 2011: 24). This would entail conducting human rights due diligence and exercising leverage.³⁶ Despite hopes from complainants that NCPs would coordinate their response to the complaint, each NCP took a separate path and the complaints each had separate outcomes, summarized in box 6.

Box 6: Summary of direct NCP outcomes

Dutch NCP – some progress

The Dutch NCP accepted the complaint in December 2012 and used its good offices to facilitate a dialogue between ABP/APG and Fair Green Global Alliance (representing Lok Shakti Abhiyan). On 6 March 2013 the NCP issued a provisional final statement stating that:

- ABP/APG has and will continue to exercise its leverage over POSCO in the form of phone calls, correspondence and face-to-face meetings with the company, and is therefore compliant with the OECD Guidelines (Dutch NCP, 2013: 8).
- There is concern about forcible land acquisition and violence in the area, and gaps between the issues raised in the complaint, and the response from POSCO, and “there is a need from the beginning of the project development for the establishment of a constructive and meaningful stakeholder consultation process between POSCO India the local communities and NGOs to identify, prevent and mitigate any negative impact related to the project” (Dutch NCP, 2013: 6).
- Parties agreed upon a draft Terms of Reference for an independent review and assessment of contentious issues in Odisha that could contribute to meaningful stakeholder dialogue (Dutch NCP, 2013: 2).

This statement was provisional in the hope that the Norwegian and Korean NCPs might coordinate activities to facilitate the outcomes agreed in the Netherlands. However, by the end of May the other two NCPs issued their own final statements. Though the Korean NCP did not pursue the case, POSCO did write to the Dutch NCP indicating willingness to engage in dialogue with the complainants and ABP/APG, and to explore possibilities for an independent review assessment panel (Dutch NCP, 2013: 7). The Dutch NCP finalised its final statement in September 2013, when it became clear that the parties could not agree on terms for a panel, but continued informal dialogue with all parties.

³⁶ The Norwegian NCP final statement puts this clearly: “The NCP has examined two dimensions of the application of this chapter of the Guidelines to NBIM: (1) the extent to which NBIM has integrated the OECD Guidelines provisions on human rights – including due diligence -- into its policies and processes; and (2) the steps NBIM has taken -- or omitted-- in response to the allegations in this Specific Instance” (Norwegian NCP, 2013: 6).

Box 6 (cont.)

Korean NCP – rejected the complaint

On 11 May 2013, more than six months after the complaint was submitted (the OECD Guidelines suggest initial assessments should be made within three months), after some written submissions from POSCO and the complainants providing clarification on the various aspects of the allegations in the complaint, the Korean NCP declined to pursue the complaint any further on the grounds that the impact assessments and violent encounters are the responsibility of the Indian government, rather than POSCO. In an ‘initial assessment’³⁷, the South Korean NCP stated that:

“The complaint is not directly related to business activities of Posco India. Instead, it is related to the administrative activities of the provincial and the central governments of India and the rulings of the Indian court, whose legality and legitimacy are not to be determined by the Korean NCP. [...] On the basis of the due diligence provisions and other procedural or practical issues stated in the Guidelines, the Korean NCP cannot find any problems in the court rulings and other relevant procedures of the Posco case. Therefore, the Korean NCP has decided that there will be no additional proceedings.”(Korean NCP, 2013)

Norwegian NCP – pension fund refused cooperation but strong final statement

The Norwegian NCP was willing to offer its good offices to engage the case, but NBIM refused. In a final statement issued on 27 May 2013 (after the Korean NCP), the Norwegian NCP concludes that,

“NBIM violates the OECD Guidelines chiefly on two accounts. First; by refusing to cooperate with the OECD NCP NBIM violates the OECD Guidelines Procedural Guidance. Second; by not having any strategy on how to react if it becomes aware of human rights risks related to companies in which NBIM is invested, apart from child labour violations.” (Norwegian NCP, 2013: 7)

Overall, though a fact finding ‘review assessment panel’ and associated dialogue was suggested, it did not eventuate and the complaints to the OECD NCP had no tangible outcome for the affected communities in Odisha. The issue of functional equivalence between NCPs was highlighted but no progress towards such equivalence was demonstrated. The only unequivocal success in the complaint, from the complainants’ perspective, was that the process confirmed that minority shareholders have obligations regarding human rights due diligence, and the exercise of leverage to prevent or mitigate adverse human rights impacts. Each of these themes is explored in more detail below.

³⁷ An ‘initial statement’ is typically used to make public a judgment on whether or not a NCP has decided to offer ‘good offices’ to complainants to resolve a complaint, and ‘final statements’ are issued upon conclusion of a case that was engaged by the NCP.

Independent review assessment panel and dialogue

One of the most effective barriers to having grievance about human rights heard meaningfully in this case has been the corporate and government influence over information about the project in Odisha, described above.³⁸ In particular, the only available sources of information on human rights impacts of the project have come from civil society organisations, or from occasional investigations by government commissions, such as the NHRC. There is thus a considerable lack of reliable information regarding the social or human rights impact – present or anticipated – of the POSCO project. In light of this significant challenge to accountability in the POSCO case, the complainants and ABP/APG agreed that a fact-finding mission would be a valuable contribution towards addressing human rights concerns in this case.³⁹

As such, the Dutch NCP-facilitated dialogue between ABP/APG and Fair Green and Global Alliance (representing Lok Shakti Abhiyan) resulted in a ‘draft Terms of Reference for a Review & Assessment Mission’ agreed between these two parties. The terms included:

- “a mission of independent, authoritative members to prepare a high level assessment of the social, environmental and human rights aspects of all proposed POSCO investments in Odisha;
- to assess how meaningful ongoing stakeholder engagement can be set up, in which the right to free, prior and informed consent is assured, including compliance with rights of indigenous people and forest dwellers, as defined by the UN Declaration on the Rights of Indigenous Peoples (DRIP);
- the Mission to be acting under the authority of the NCPs of the Netherlands, Norway, South Korea; at least one member must be from India or of Indian origin with a sound understanding of the local situation and context;
- the findings of the Mission will be made public” (Dutch NCP, 2013: 8)

In a private communication to the author of this report, the Dutch NCP explained that it understood the composition and process of this mission as an important safeguard for communities to engage in dialogue. Specifically, the mission would be composed of three members, one from South Korea, one from India, and one independent chairperson; funding would be provided by the NCP, rather than any of the parties; and anonymity would be guaranteed for anyone who spoke with the committee.

In July 2013, POSCO unexpectedly wrote to the Dutch NCP indicating the company’s willingness to cooperate with the Dutch NCP’s ‘consultations’ and the Review Assessment Panel, but attached a series

³⁸ See ‘Inadequate consultation and no consent’

³⁹ A further problem for the complainants is that they are confident there are direct connections between POSCO and the ‘goons’ that commit acts of violence and intimidation against anti-POSCO villagers, but have been unable to prove the connection. They argue that another possible outcome of a fact-finding mission is the proof of such a connection.

of conditions which would preclude the process from generating new and impartial information, including the company's right to review and reassess the findings, the exclusion of 'issues related to the Indian authorities', and confidentiality provisions (Dutch NCP, 2013: 6).

After POSCO proposed its conditions for a review assessment panel, discussion stalled. POSCO, ABP/APG and Fair Green Global Alliance were invited to informal meetings facilitated by the Dutch NCP, who strongly encouraged ongoing dialogue. However, the complainants were unwilling to engage in a dialogue in light of ongoing land acquisition efforts and the absence of any improvement in the human rights conditions on the ground, as reported by the local complainant, Lok Shakti Abhiyan.⁴⁰ In its communications with the Dutch complainants, the Dutch NCP maintains that both parties, but particularly the complainants, have contributed to the failure of this process because they refused to cooperate in further dialogue (Personal communications with Wiert Wiersema, BothENDS, January and May 2015).

This approach, which emphasizes the capacity of dialogue to resolve a problem (including in the absence of adequate information), is problematic because of imbalances in power between the parties, particularly in regards to information. POSCO has the advantage of having controlled the available official information about the project, such as EIAs, since the project was first proposed, while communities rely on national and transnational civil society groups to provide counter-evidence to POSCO's account of the situation on the ground. In this context, and in the broader political and economic context of Odisha, POSCO faces no risks in entering negotiations and dialogue. If discussions do not lead to an agreement, the company is able to argue it was fulfilling its duty to consult. This power imbalance was not taken into account in the Dutch NCP's insistence that facilitating dialogue became the only role the NCP can play. Disappointment in this position was expressed in an email to the Dutch NCP from Norwegian complainants ForUM: "The OECD GL[Guidelines] do not have much to offer victims of HR [human rights] violations and corporate abuse. A safe, neutral space where they can share their stories is the least we should provide, if we are to continue to promote the Guidelines" (Gunhild Ørstavik, Forum, Norway, in an email to Dutch NCP, Personal communication, May 2015). The complainants perceived that, with no change on the ground and no fact finding mission, neither safety nor neutrality would be a condition of any dialogue.

The complainants often lack access to information (such as the Xavier Institute of Management social impact assessment, the only known assessment of the social impact of the project); the information they do provide, from civil society supporters, is often treated with scepticism by authorities, or is not available at crucial times in which legal appeals can be lodged (see analysis above, of legal and regulatory avenues of appeal); and they lack influence with the Odisha state government (see analysis

⁴⁰ Another barrier to the fact finding mission is resourcing and political support. The Dutch NCP said in its final statement that "The Netherlands NCP would contribute to such a mission provided that it is jointly commissioned with the South Korean and Norwegian NCP and Indian authorities are consulted" (Dutch NCP, 2013: 8).

above of applications for OTFD status, and gram sabha resolutions rejecting the project). While the complainants may treat POSCO's information with scepticism as well, they do not do so from a position of power, influence or authority. Therefore, for the complainants, entering into dialogue, particularly in the context of inadequate information, means they stand to lose their only source of leverage in resisting the project– continued opposition. Entering dialogue means that they are therefore less likely to achieve their objectives in relation to resistance (to land acquisition) or remedy (for violence and intimidation).

Applying pressure on complainants to engage in dialogue in the absence of adequate and balanced information sources about the situation on the ground acts, therefore, not as an enabler of resistance and access to remedy for human rights harms, but a barrier to it. A more helpful approach from the Dutch NCP would have been to apply pressure on both parties to come to some agreement about an independent fact finding mission. Such a mission would need to depart significantly from the conditions suggested by POSCO, which would likely facilitate a replication of existing information. As Gunhild Ørstavik (from ForUM in Norway) put it in an email to the Dutch NCP,

'We may not be able to offer much more than listening, but by that we acknowledge the difference between the realities faced by the people on the ground in a "specific instance" and the policy issues we deal with as well- educated, well- dressed Northerners at air-conditioned venues. In order for a deeper understanding we need to move out of our comfort zone, just as some Southern partners do when they come to speak at our conferences.' (Personal communication, May 2015)

The complainants have formally invited both the Dutch NCP and ABP/APG to visit Odisha in order to better understand why they are unwilling to engage in a dialogue without appropriate safeguards for its basis. In late 2014 and early 2015 the Dutch complainants had meetings with ABP/APG and the Dutch NCP to urge them to accept the invitation. The NCP refused, arguing that it lacks the international support (from the Korean and Norwegian NCPs) to take effective further action on the proposed review assessment panel, and that a visit to the site to verify why the complainants *refuse* dialogue is not productive (personal communication, Herman Mulder, Dutch NCP, May 2015).⁴¹ ABP/APG also refused the invitation, arguing that it had visited the project area in 2013 on the invitation of POSCO and that it did not consider it opportune to pay another visit. It reiterated its position that it stands prepared to facilitate a dialogue between local civil society groups and POSCO-India. ABP/APG has not responded to additional queries from complainants on how it further uses its leverage over POSCO, or what might trigger it to divest (Personal communication with Wiert Wiersema, BothENDS, May 2015).

⁴¹ The Dutch NCP has engaged in fact finding missions in the past, for example in the Friends of the Earth vs. Arcelor Mittal case. See OECD Watch (2015) for further details.

Functional equivalence and coordination of NCPs

The 2011 OECD Guidelines contain four principles of functional equivalence for NCPs: visibility, accessibility, transparency and accountability.⁴² In relation to specific instances, NCPs must be impartial, equitable, predictable, and operate in a way that is compatible with the Guidelines. NCPs are required to conduct an initial assessment within three months to ascertain whether or not the complaint merits further attention. If it is decided that it does, the NCP is to offer its good offices to the parties. In doing so, the NCP may seek advice from relevant external parties, other NCPs involved in the case, or the OECD Investment Committee if clarification of the Guidelines is required. If a dialogue between parties is agreed, it must be voluntary, consensual, and non-adversarial. Upon conclusion of procedures, the NCP is expected to make the outcome public, with due respect for sensitive business or stakeholder information. Within the bounds of these principles, governments are able to constitute their NCPs in any institutional arrangement.

OECD Watch and the Trade Union Advisory Committee (TUAC) of the OECD have long been concerned that functional equivalence is not a reality for NCPs (OECD Watch, 2014: 10; TUAC, 2014: 2). The POSCO case is exemplary in this regard. In direct responses to exactly the same complaint, three NCPs arrived at three different conclusions: one declared the case did not merit further assessment, one was unable to engage the relevant company (the Norwegian pension fund), while one took proactive measures to facilitate a dialogue, and offered financial support for a fact finding mission.

Similarly, the POSCO case also exemplifies failures of coordination among NCPs. Though the Dutch NCP took a number of formal and informal steps to facilitate coordination between NCPs, including regular communication, invitations to formal meetings, the publication of a provisional final statement to make time for agreement among NCPs, and an invitation to the other NCPs to co-sponsor the fact finding mission, coordination was not achieved. Though the Norwegian NCP had agreed to coordinate, for reasons that are unclear this did not happen, and, despite stating its commitment to coordinating responses to shared complaints with other NCPs (Korean NCP, 2012), the Korean NCP was not willing to work with these two NCPs (Dutch NCP, 2013: 2). The three only met to discuss the case at the annual NCP meeting in Paris, after the Norwegian and Korean NCPs had finalized the cases. The Dutch NCP commented, in its final statement, that “although each NCP has its own responsibility to deal with its part of a multiple case, early exchanges of views and possible coordination are essential in order to meet the OECD Guidelines requirements of coherence between the NCPs’ approaches (principle of functional equivalence)” (Dutch NCP, 2013: 3).

The POSCO case did trigger discussions about functional equivalence and coordination at the June 2013 OECD NCP annual meeting in Paris, and it featured again at the 2014 meeting. There is now informal agreement among NCPs, arising from that meeting, to take up the Dutch NCPs suggestions. The Dutch

⁴² See the Guidelines: Procedural Guidance.

NCP confirms that the OECD Working Group on Responsible Business Conduct now shares the view that the NCP closest to the impact has the responsibility to coordinate, while not mitigating the responsibilities of other NCPs who have received related complaints about corporations that are not contributing, but are directly linked to the impact (e.g. investors) (Private communication, Herman Mulder, Dutch NCP, June 2015). At this stage, it is too soon to determine the impact of this agreement in practice. One potential problem of the search for functional equivalence is the risk of ‘ratcheting down’ rather than up, though it is clear that those advocating for functional equivalence have in mind equivalence with the most, rather than the least robust NCP processes. For those in the POSCO case, a lack of functional equivalence contributed to the lack of meaningful outcome for complainants.

Minority shareholding

The Dutch NCP noted, in its final statement, that applicability of the Guidelines to the financial sector is unequivocal: “it is no longer a question if the Guidelines in general and the due diligence provisions in particular apply to the financial sector, but how they do apply” (Dutch NCP, 2013:5). However, applicability to minority shareholders was, at the beginning of this case, still in question. The Dutch NCP, working with a cooperative company with a history of being responsive to business and human rights issues, ABP/APG, was able to determine that the Guidelines do, in fact, apply to minority shareholders, in particular, the provisions relating to risk based due diligence on social and environmental issues. The Dutch NCP’s final statement explained “The Guidelines do not make any exception for minority shareholders nor do they indicate that the application is limited to shareholders from a certain size onwards”(Dutch NCP, 2013: 5). The Norwegian NCP agreed (Norwegian NCP, 2013: 22-23).

This determination regarding the applicability of the OECD Guidelines to minority shareholders, represents a significant advancement in the tools available to human rights campaigners and the communities they support. It opens the door to holding national pension funds and high profile private financiers to account for abuses perpetrated by companies in which they are invested.

The Norwegian NCP clarified that the “three basic steps” all enterprises should take, and which should constitute the framework also for minority shareholders, are laid out in the Guidelines: “(i) have a policy commitment to respect human rights; (ii) carry out human rights due diligence; and (iii) provide for or cooperate in remediation of adverse human rights impacts in designated circumstances” (Norwegian NCP, 2013: 26). Both pension funds already have relevant policies. However, how minority shareholders can be expected to exercise due diligence over a large portfolio of investments is a difficult question, as is how they might exercise leverage in order to facilitate remediation beyond participation in an NCP process (Norwegian NCP, 2013: 40).

Due diligence

In its discussion of due diligence, the Norwegian NCP gives a detailed outline regarding expectations of minority shareholders. The NCP affirms the principle that “responsibilities are tied to impacts: enterprises should be prepared to address the impacts they have, not just those they find of interest” (Norwegian NCP, 2013: 27) and criticizes NBIM for having “significantly narrowed the scope of human rights that it takes into consideration in many of its policies and practices, particularly regarding the screening of companies and active ownership” (Norwegian NCP, 2013: 27) in particular by focusing on children’s rights at the expense of other relevant human rights issues.

Recognising the practical difficulties investment firms face in conducting due diligence for all investments, the Norwegian NCP elaborates at length how a minority shareholder might undertake the four aspects of due diligence required by the guidelines: “(i) assessing actual and potential human rights impacts; (ii) integrating and acting upon the findings; (iii) tracking responses; and (iv) communicating” (Norwegian NCP, 2013: 29). The statement encourages integrated assessment procedures that focus on high-risk regions, sectors or companies (p.30), and ongoing tracking of the effects of exercising leverage on companies, for example through qualitative and quantitative indicators, and stakeholder engagement (pp.37-38). Finally, the statement also affirms that allegations of adverse human rights impacts should be investigated (p.41). The NCP holds up NBIM’s due diligence procedures around children’s rights as a model. Jointly, these suggestions provide clear guidance regarding expectations of minority shareholders in relation to human rights due diligence.

Exercising leverage

The affirmation from the Dutch and Norwegian NCP’s that minority shareholders have obligations in relation to human rights impact in companies in which they are invested raises a further set of practical questions regarding how, once due diligence has revealed a human rights issue, a minority shareholder might go about exercising leverage.

The Dutch case is unusual in the extent to which the NCP was dealing with a company already committed to using its leverage to influence companies in which it is invested. The Dutch NCP found in its final statement as follows:

“For more than two years APG has actively engaged in a dialogue with POSCO about the human rights and environmental impacts of the project in Odisha, India and has encouraged POSCO to apply the principles of responsible business conduct. APG has used its leverage and has sought ways to increase it, and has actively brought the joint agreement with SOMO and Both ENDS to the attention of POSCO and urged POSCO to address the issues raised in the agreement. Hence the NCP finds that APG has taken its responsibility as a shareholder and is compliant with the requirements under the Guidelines. It used its leverage through extensive correspondence, phone calls, as well as face to face meetings with POSCO representatives at POSCO offices in Seoul. [...]

The NCP is especially pleased with the fact that APG is committed to continue to use its influence bringing POSCO's business practices in line with the Guidelines and other international principles and standards, under the expectation that POSCO publicly agrees to adopt these standards for all its operations including those in India and publicly reports on their implementation." (Dutch NCP, 2013)

The Norwegian NCP's final statement, in its criticism of NBIM for its *failure* to exercise leverage, makes more concrete suggestions regarding how minority shareholders might exercise leverage. The Norwegian NCP states that "The appropriate action for an enterprise to take depends on factors including its leverage over the other entity, how crucial the relationship is to the enterprise, and whether terminating the relationship would have adverse human rights impacts" (Norwegian NCP, 2013: 34). It acknowledges that minority shareholders do not have the same tools available to them as majority ones, but suggests a range of pre-investment (imposing conditions) and post-investment (shareholder proposals, shareholder voting, engagement with management, and the threat of divestment) tools that may be effective (Norwegian NCP, 2013: 34-35). In relation to the provision of remedy, though investors cannot be expected to *provide* the remedy, they should provide *access* to it, for example by requiring the company to establish an operational-level (internal) grievance mechanism (Norwegian NCP, 2013: 41).

Notably, both NCPs also point out that some minority shareholders have special characteristics that render their leverage greater than their share of investment. In the case of NBIM, its potential for leverage is increased because it is so large, because it carries "the reputation – and to some extent the influence – of the Norwegian state", and because it has a formal and public process for considering divestment – the Council of Ethics – which is monitored by other investors and actors. This enabled, for example, NBIM to engage Monsanto on the issue of child labour at a time when its ownership was less than it currently is in POSCO (Norwegian NCP, 2013: 42). Drawing on the UN Guiding Principles, the Dutch NCP argued that, "the size of a share that an investor holds in a company does not determine whether there is a business relationship for the purpose of the Guidelines. It rather is a factor to determine whether or not the investor in question disposes of sufficient leverage to effectuate change in the wrongful practices of the entity that causes the harm" (Dutch NCP, 2013: 5). As a national pension fund, ABP/APG fits this profile, and has been, and continues to be, willing to exercise its leverage over POSCO, despite having only a very small investment of 0.084% in POSCO.⁴³ This is in contrast to the Norwegian pension fund, which has a similar investment profile but was unwilling to exercise its leverage in this case.⁴⁴

⁴³ As at October 2012 (Dutch NCP, 2013: 4).

⁴⁴ As of December 2012 NBIM's holdings of shares in POSCO amounted to 1,420 million NOK, representing 0.9 per cent ownership (Norwegian NCP, 2013: 16).

However, despite ABP/APG's efforts, and the Norwegian NCP's criticisms of NBIM, POSCO has made no changes to its activities on the ground in India. As Wiert Wiertsema, a representative of BothENDS who was involved with Fair Green and Global Alliance for this complaint, explained, "POSCO is not under any serious pressure [from investors] to change course" (Interview with Wiert Wiertsema, BothEnds, Amsterdam, November 2013).

The current state of play: mixed and uncertain outcomes from multiple grievance channels

At the time of completing this report (May 2015), POSCO holds 1703 acres of the land it requires for the plant, but both its forest and environmental clearances are under challenge, and its access to iron ore remains in doubt due to a recent ordinance. It is unlikely that the company will give up on its plans, but presently it is biding time until more certainty can be achieved regarding raw materials. PPSS continues its resistance through its strategy of peaceful direct action and non-engagement with POSCO. PPSS and its supporters continue to pursue any avenues possible, focusing their attention on, firstly, legal challenges to the forest and environmental clearances POSCO has received; and, secondly, transnational civil society mobilization with a particular focus on trying to bring fact finding missions to verify the human rights abuses on the ground in order to improve their position vis-à-vis POSCO and the government in their resistance efforts.

In this context, the OECD NCP complaint occupies a peripheral but not unimportant place in the pursuit of human rights redress and protections. The potential for systemic change inherent in the minority shareholder opinion and guidance from Norwegian NCP is important, and the appeal for functional equivalence (equivalent to the highest, not the lowest standards) is lent credence from the divergent response from the South Korean NCP. Yet, any improvement in these areas can only be slow and iterative. Meanwhile, anti-POSCO activists remain sceptical about the possibility that the process will bring about an improved human rights situation on the ground, but hopeful that ABP/APG might visit India to see for themselves why communities refuse to negotiate with POSCO, and the risks they face by giving POSCO the credibility that such a negotiation would afford it. Whether or not anything will come of this process before POSCO starts construction on the large tracts of land it has already acquired remains unclear.

Factors influencing resistance and access to remedy

The following section draws out key themes in the analysis presented above to identify factors that have both constrained and enabled resistance and access to remedy.

Factors constraining resistance and access to remedy

Political economy

The potential of non-judicial mechanisms to facilitate resistance and/or provide access to remedy is shaped by the political and institutional conditions under which the broader conflict plays out. In this case, a strong relationship between POSCO and the state government of Odisha, at least until 2015, has resulted in (albeit inconclusive) favourable outcomes for POSCO, and unfavourable ones for POSCO's opponents in affected villages, in many regulatory channels. The strong networks of influential pro-industry government and business actors have also generated an environment that is politically, and sometimes physically hostile to anti-industrialist claims, and has delegitimised the farmers' concerns in the eyes of Odisha's middle class and therefore diminished their political capital, making it harder for them to win the political support that would be necessary for the state government to meet their demands and reject the project outright.

Until the 1980s, Odisha's economy was predominantly agricultural, with some light manufacturing (Adduci, 2012). Where there were industrial developments, such as the state-owned Rourkela steel plant, NALCO or the Hirakud dam, these were designed to meet the needs of the state for energy, or broader India for the expansion of its industrial base, but they did little to contribute to the state's economic growth (Adduci, 2012). Beginning as early as the 1980s but accelerating under the BJD government, and Naveen Patnaik, Chief Minister since 1997, the state government has sought to reorient the economy towards industrialization.⁴⁵ The state government sees industrialization, particularly through mining and value add processes (such as steel manufacturing), as the key to generating employment (Adduci, 2012: 78). This shift in state economic policy towards industrialization and liberalization has led to economic growth rates between 7% (in 2003/2004) (Adduci, 2012: 85) and 9% in 2012-2013 (Planning Commission, 2014: 26), consistently above the national average.

Consequently, poverty has also decreased significantly in the state, from 57.2% in 2004-2005 (60.8% in rural areas and 37.6% in urban areas) to 32.59% in 2011-2012 (35.69% in rural areas and 17.29% in

⁴⁵ Naveen Patnaik is son of Biju Patnaik, the founding father of the state of Odisha. Patnaik and his party, BJD, were in an alliance with the Bharatiya Janata Party (BJP) from 1998 until 2009, after which time BJD was able to gain a majority in the Legislative Assembly alone. BJD's platform is one of neoliberal economic policy and industrialization. The party's success is often attributed to the lack of a strong opposition as neither BJP nor Congress are strong at State level. BJD is not, however, popular in tribal areas or areas, such as Jagatsinghpur, where there are peoples' movements.

urban areas). Nevertheless, Odisha remains one of the poorest states in India, where national poverty rates have dropped to 21.92% in 2011-2012 (Planning Commission 2014:28-29). There are also criticisms that the benefits of these levels of economic growth are not evenly distributed. The state has an unusually high proportion of Scheduled tribes, 22.85%, compared to 8.61% of the national population (Ministry of Tribal Affairs Statistics Division, 2013: 123).⁴⁶ Among these groups, poverty rates are *significantly* higher than the state average: 63.52% for scheduled tribes, and 41.39% for scheduled castes in 2011-2012 (Planning and Coordination Department 2014: 271).

Furthermore, critics have argued that increases in mining and industry have not had the anticipated effect of also increasing production and employment in downstream sectors such as manufacturing (Adduci, 2012: 86-88). The failure of mining-led industrialization to bring benefit to all the people of Odisha is, in part, the result of the government's failure to adequately regulate the industry to ensure that private investments adhere to the rule of law, and make adequate assessments of the costs and benefits of private (or public) industrial projects (Maringanti et al., 2013: 71). Other critics have, in addition, attributed this 'growth without inclusion' (Panda, 2008) to the parallel neglect of agriculture (Mishra, 2010). The agricultural sector provides more employment than the industrial sector, yet the state government has allowed the sector to stagnate through lack of investment, as well as slow but steady dispossession of agricultural land and other forms of common property (such as forests and water resources) that traditional agriculturalists use in farming (Mishra, 2011). Consequently, the spatial and social concentration of poverty persists and scheduled tribes and castes continue to disproportionately suffer the negative effects of agricultural and environmental neglect, without benefitting from industrial growth (Mishra, 2011).

Nevertheless, the state government has not wavered in its commitment to neoliberal industrialisation policies. Odisha possesses approximately a third of India's iron ore, a quarter of its coal, more than half its bauxite, and almost all its chromite, as well as vast reserves of other minerals (Department of Steel and Mines, 2015a). In order to exploit these natural resources, the state has sought to out-compete other states to attract private, including foreign capital, and concentrated its efforts in the iron ore and steel sectors.⁴⁷ A progressively established policy framework seeks to facilitate this investment through committing to deregulation, with a focus on the mineral sector, and limiting the government's role to establishment of infrastructure through public-private partnerships (See the Odisha Industrial Policy 2001, Industries Facilitation Act 2004 and Industrial Policy 2007), providing for government-supported land acquisition through the creation of IDCO, and providing special security for industrial projects through the Odisha Industrial Security Forces Act (2012).

⁴⁶ The Ministry of Tribal Affairs defines tribal peoples as having indications of primitive traits, distinctive culture, geographical isolation, shyness of contact with the community at large, and 'backwardness'. They are entitled to special protections under the Constitution (Ministry of Tribal Affairs, 2015).

⁴⁷ 80% of mining leases in the state since liberalization have been for private companies, and 70% of mining licences since liberalization have been for iron ore (Adduci, 2012: 79).

Iron ore and steel have been the most sought after developments by the state government. A report by Utkal University, commissioned by POSCO, declared that “As air is to the living beings, steel is to the national economy” (Mohanty and Mishra, 2007: 2). The state currently has 49 MoUs with national and international steel companies for steel plants, of which POSCO’s is the largest projected investment (Department of Steel and Mines, 2015b). In this context, POSCO’s role in South Korea’s development stands as a model the Odisha government wishes to emulate, though under a highly liberalized economic environment, rather than the developmental state under which POSCO was born.

With two major integrated steel mills in Korea, in Pohang and Gwangyang, major joint ventures with state-owned steel companies in the US (USS-POSCO, 2015) and Indonesia (POSCO, 2013), and a number of other planned and rumoured expansions in other parts of the world, POSCO was ranked by the World Steel Association in 2013 as the 6th largest producer of steel (World Steel Association, 2013).⁴⁸ The company was established in 1968 as a state-owned enterprise, and was considered by then President Park Chung Hee to be the most important company in the development of an industrialised South Korean economy. As Rhyu describes,

"When his people yearned to escape from the hunger they endured during the lean months of spring, Park envisioned the building of an industrialized nation, with the steel industry as the engine of growth for the rest of the heavy and chemical industries, from machinery to automobiles to shipbuilding to the defense industries. 'Steel is national power,' said Park at the celebration of POSCO's tenth anniversary." (Rhyu and Lew, 2011: 322).

Consequently, in its foundational decades POSCO enjoyed very high levels of government support for its operations in the form of tax incentives, subsidies and trade barriers that would not be allowed under today’s WTO rules (Tipton and Hundt, 2006), and has become accustomed to operating with high levels of state support. POSCO was privatized in 2000 and in 2014 was rated 236th on Forbes’ Global 2000 with a market capitalisation of almost USD25 billion (Forbes, 2014).

The Odisha and Indian governments have maintained, since 2005, a close relationship not only with POSCO, but also with the Korean government. In January 2010, for example, (then) President Lee Myung-Bak was a special guest at Indian National day celebrations, and had intended to visit Jagatsinghpur for a ribbon-cutting ceremony to launch the POSCO project. Local media reported that “Government channels are working overtime to clear hurdles faced by the steel giant and consultations are on with the Odisha government to expedite the process” (Narayan and Subramaniam, 2010). Despite these assurances, local protesters forced organisers to cancel the ceremony. Most recently, in

⁴⁸ POSCO also has some other smaller investments and operations in other parts of India, including Maharashtra (POSCO-India 2015a.), Jarkhand (Siddhanta, 2015) and Gujarat (Economic Times 2014a), and a project in Karnataka that failed because of a combination of local resistance to land acquisition, and a state-wide ‘mining scam’ (POSCO-India 2015a; The Hindu 2013).

November 2014 Prime Minister Modi assured current Korean President Park Geun-hye, at the East Asia Summit in Myanmar that the project has his government's full support and that he will make efforts with the Odisha state government to resolve any outstanding issue (Times of India, 2014). The Korean government, for its part, relies only on the NCP process to provide remedy for any concerns about human rights abuses, telling the UN Human Rights Council that the NCP can "effectively mediate the filed complaints" (Permanent Mission of the Republic of Korea to the UN, 2014), though the Korean NCP had already rejected the case at that time. Both nations see themselves as standing to gain from this project and have not demonstrated a willingness to seriously engage complaints about the project.

There is also more at stake, here, than the POSCO project alone. The Odisha government's strong support may be explained, in part, by POSCO's capacity to embellish or tarnish Odisha and India's reputation as a hospitable host for foreign capital: the company, and the Korean government, have publicly expressed concern about "red tape" (Economic Times 2014c). The state government of Odisha and the central government continue to publicly assure both POSCO and the Korean government that relevant clearances will be expedited (Economic Times 2014d, 2014e; MZPSG, 2010: 28). State and national level support for POSCO within government and among political parties is almost unanimous.⁴⁹

On the grounds that the proposed benefits are absolutely necessary for the economic development of the state and the country, the state government of Odisha and, to a lesser extent, the central government in India have provided high levels of support for POSCO's Odisha project in the form of promises of unprecedented access to cheap natural resources (at least until recently), and commitments by the State government to expedite regulatory clearances. In the 2005 MoU, POSCO was promised, by the State government, access to some of India's highest quality iron ore, in the Khandadhar Hills (MZPSG, 2010: 28). In 2006, when the Government of Odisha first recommended to the Central Government that POSCO be granted a prospecting lease for the area, 225 other applicants were still awaiting the outcome of their requests for the same (MZPSG, 2010: 28). The state government's support for POSCO to secure the prospecting lease has twice been challenged in court, each time 'diligently defended' by the state government, as required under the MoU.⁵⁰ The Central government is yet to approve the Odisha government's recommendations regarding prospecting leases for POSCO, and the area being proposed has now been reduced from an initial 6204ha to around

⁴⁹ One recent and possibly significant exception to this is the Minister for Tribal Affairs since 2014, from BJP, Jual Oram, who is from Sundargarh district where the proposed mine site is located. He has vowed to 'say no' to POSCO's mining plans, despite his fellow party members and PM Narendra Modi being in favour of POSCO (Mohanty, 2014a). Both Congress and BJP at the all-India level have expressed consistent strong support for POSCO, so even though both contain some members at state level that have sought to gain political credibility in affected areas by demonstrating their solidarity with POSCO opponents, neither party can claim any meaningful or consistent record of objection to the company and its plans. The Leftist parties have also failed to mount a strong opposition, and have themselves been inconsistent, sometimes claiming that the project is acceptable as long as it is moved elsewhere.

⁵⁰ The MoU states that "In the event of any litigation at any stage, Government of Orissa will diligently defend their recommendations made in favour of the Company in the appropriate judicial, quasi judicial fora" (MoU Article 6(v)).

2000ha (Mohanty, 2014b). In January 2015, while the central government was still considering this recommendation, an ordinance was introduced that requires all mining licences to be distributed on the basis of auction (Ashreena, 2015). As POSCO does not yet have approval, it will now have to bid for the desired licences like other companies, and therefore pay the market price. Since this ordinance, the Government of Odisha has repeatedly applied pressure on the central government to grant an exemption for POSCO (Business Standard 2015).

Though there have been numerous delays and challenges to the forest and environmental clearances, the support of the state government in overcoming these challenges has been consistent. This support is explicitly provided for in the MoU, which requires the Odisha state government to “facilitate all clearances and approvals of the Central Government if required” (MoU: Article 5 (iv)). Central decision making authorities have been more ambivalent at times, for example in the MoEF’s various iterations of conditions on clearances. However, overall the MoEF has not responded to the core concerns of authoritative investigations like the Saxena and majority Meena Gupta committees, which expressed major concerns about the project’s clearance applications and called for fundamental, as opposed to piecemeal and conditional reconsideration of the approvals. On each occasion, though committees such as the Roy Paul committee have been established, in line with procedure, to date there has not been a comprehensive assessment of the social and environmental impacts, including claims to OTFD status, for the project as a whole.

Overall, then, POSCO’s position as offering the nation’s biggest FDI has allowed it to gain the support of powerful government authorities eager to industrialise, and to retain their support for nearly 10 years through multiple regulatory and legal challenges. This has made regulatory hurdles less effective than they might otherwise be. For example, though two well-respected committees, the Saxena committee and the majority Meena Gupta committee, spoke out against what they described as illegal issuing of clearances, these criticisms have been deflected through state-government supported appeals to the benefits of industrialisation, and of the POSCO project in particular. In this environment of near-consensus in authoritative arms of government (including the MoEF, the state government and the Orissa State Pollution Control Board), it is more difficult for POSCO’s opponents to have their concerns received by authorities and the broader public as legitimate and requiring a strong response.

Insecurity, intimidation and coercion

The insecurity that has characterized Jagatsinghpur district, and especially the villages of Dthinkia and Gobindapur, has generated an environment of fear in which it is difficult for those who have grievances to express them, either formally or informally. The police have become inaccessible to communities, and have acted to repress the resistance to the project, including through long periods of occupation of villages and repeated episodes of violently breaking up peaceful protests. Police fail to respond in a timely and impartial way to complaints from anti-POSCO villagers, for example during the bomb blast of

March 2013, described above, and they are pursuing hundreds of criminal charges against anti-POSCO villagers that human rights and legal experts argue do not follow due process and for which there is often a lack of evidence (IHRC and ESCR-Net, 2013; Alternative Law Forum, 2013).

As a consequence of this environment, many people are unable to leave their villages for fear of arrest and detention. This constitutes an important barrier to meeting with lawyers or activists in Bhubaneswar or other parts of India to work together on campaigns, complaints or legal challenges. The insecurity has also made the area inaccessible to potential sources of outside support, particularly transnational support, as foreigners are prohibited from entering the affected areas, are readily identifiable, and at least one group was detained by the police as they visit the area (Interview with Hyun Phil Na (Phil) and Ju Jin (Ju), KHIS, Seoul, 12 November 2012). The Indian activists who take up this work take on significant personal risk to maintain contact with villagers and obtain enough evidence and information to pursue such avenues of redress.

A further concern raised by PPSS and its supporters is that the 'goons' that attack anti-POSCO villagers are directly connected to POSCO. Alternative media outlets have collected hours of footage showing police and 'goons' attacking villagers, but these do not prove that POSCO has financed or otherwise arranged such attacks. This remains a contested area. Regardless of whether or not POSCO has directly caused such attacks, that they are occurring between pro and anti-POSCO villagers means that the company is – inadvertently or otherwise - contributing to them, and has a responsibility to mitigate these harms, both because of their direct impact, and because of the broader impact of violence, insecurity and intimidation on the possibility of resistance and access to remedy.

Those who sustain open opposition to the project do so at great personal cost, including fears for their safety, constrained freedom of movement and subsequent limited access to healthcare, education and other services (IHRC and ESCR-Net, 2013).

Inadequate information

POSCO and the Government of Odisha have failed to provide timely, accurate and comprehensive information to those who are going to be affected by the POSCO project, and this has negatively affected the communities' ability to express grievances and concerns regarding POSCO's current and proposed activities in two key ways. Firstly, publicly available information about the project is dominated by studies produced by POSCO or bodies funded by POSCO, which constitutes a conflict of interest. Secondly, there is presently a lack of clear and unambiguous information about POSCO's intentions in regards to the size of the steel plant, about which concerned people might make a complaint.

The only information widely available about the nature and scope of the POSCO project is the MoU from 2005, and the National Council for Applied Economic Research 2006 Social Cost Benefit Analysis of the POSCO Steel Project in Odisha. The 2008 Xavier Institute of Management Social Survey and the various environmental impact assessments are not, to our knowledge, publicly available. Furthermore, each of

these has been criticized as described elsewhere in this report. This lack of information has become an even more serious barrier since 2012, when POSCO modified its proposed project by removing the privately owned land in Dhinkia and other villages from its land acquisition plan, and proposing a smaller plant. POSCO's public statements are suggestive that the company still plans to scale up to the full 12MTPA plant and associated mines and infrastructure once its position is more secure (POSCO, 2012). The Roy Paul report has called for a clear and unambiguous statement of the company's intentions for expansion (Paul, 2012: 22), and the NGT has, from its first responses to this case, called for a comprehensive approach to impact assessments and clearances for POSCO's proposed activities, one which takes into account the cumulative impact of the various aspects of the project and other existing projects in the vicinity (NGT, 2012: 26-27). In the absence of a definitive statement regarding POSCO's future plans, and associated impact assessments (both environmental and social), communities and their supporters are unable to pursue formal channels of redress because there is nothing concrete about which they can make a complaint.

This lack of information has meant that anti-POSCO activists, as well as those who are not as adamantly against the company but remain concerned about its potential impact, have had to resource and organize their own assessments to gather sufficient information with which to make a judgment about the impact of the project. In varying degrees, POSCO has sought to discredit news and reports that reflect badly on the company (for example by suggesting they have come from sources intent on damaging the company) (POSCO India, 2008). In responses to allegations of this kind, the company has reasserted its compliance with relevant laws and standards without providing extra information (POSCO India, 2010). It has also labelled research as 'malicious propaganda' and referred to alternative sources of information as being driven by 'vested interests' (POSCO India, 2013b). To our knowledge, the Government of Odisha, the Ministry of Environment and Forests, and other relevant government bodies have not made any public response to alternative sources of information (such as MZPSG 2010 or IHRC & ESCR-net 2013), nor indicated the impact of these alternative reports in any publicly documented decision making processes. As such, it appears that the information provided by POSCO has dominated decisions about the project, while concerns regarding human rights or social impacts have not occupied a central place in any decision making processes, all of which formally focus on technicalities predominantly related to environmental impacts.⁵¹

More thorough, less contested and more publicly available impact assessments, including social and human rights impact assessments, would make POSCO more compliant with the OECD Guidelines and other best practice international standards regarding human rights and mega-projects. Such

⁵¹ A December 2014 Ordinance attached to the Land Acquisition Act (2013) further reduces the requirements for social impact assessments and consent in land acquisition efforts associated with national security, defence, rural infrastructure including electrification, industrial corridors and building social infrastructure, including public private partnerships where ownership of land continues to be vested with the government (Economic Times 2014f).

information, in addition to constituting a key part of meaningful consultation, would provide a platform on which PPSS and its supporters could mount further complaints to express their concerns about specific aspects of the project, as well as the project overall, through formal channels in the Indian bureaucracy and judiciary, and in public campaigns.

Factors enabling resistance and access to remedy

Resilience and opposition

PPSS has exhibited resilience in its opposition to the POSCO project, and maintained a high level of opposition over a prolonged period of time, with sustained connections to a strong network of activists that unconditionally supports PPSS' anti-POSCO and anti-engagement stance. This resilience and persistent refusal to engage in dialogue with POSCO or the government is one of the most important factors in the failure of the POSCO project to make progress so far. Without the physical prevention of land acquisition at crucial points in the last decade, it is likely that POSCO may have been able to reach some key milestones in the development of its project (particularly acquisition of the land for the plant), beyond which it is doubtful that the project could be either moved or stopped. These highly localized forms of political mobilization will not, alone, prevent the project moving ahead, evident in the fact that the company now holds 1703 acres at the proposed plant site. However, they have been the core of the resistance against the project, and have enabled also the secondary effects of identifying the movement with a broader constituency of marginalized farmers, attracting support from a national network of other people's movements, and engaging the energies of state, national and international activists for their cause.

Furthermore, the refusal on the part of the movement to enter negotiations regarding compensation or benefit sharing has strengthened the movement's position. This refusal has denied POSCO and the State government the opportunity to divide the movement, for example by offering individual incentives to particular community leaders, which has taken place in other similar case studies in this research project (see Weda Bay report in this series). The lack of engagement has also allowed the movement to maintain outside sources of pressure, for example from national and international civil society and human rights groups, or complaint channels such as the OECD NCPs. Such sources of support may be more reluctant to support the villagers or entertain a complaint if they think that an agreement is imminent and that the company is exercising its duties in relation to human rights due diligence and respect. From a strategic perspective, this has been a very effective approach in mitigating the risk that POSCO might use dialogue to deflect further criticism in regards to activities in Odisha.

Given the tendency in the OECD NCPs and other transnational, non-judicial grievance mechanisms, to encourage dialogue, negotiation and problem-solving over more adversarial methods of expressing grievance, this is a particularly important finding to emerge from this case study.

Strong local communities and organizing capacity

Further to the previous finding, the highly developed organizing capacity of the people in the proposed plant area, and their capacity to access and build relationships with a broader network of experienced anti-displacement activists, has been crucial in sustaining PPSS over such a long period. The involvement of individuals with experience and leadership skills to unite, organize, and mobilise has acted to strengthen resistance to multiple forms of coercion, such as violence and intimidation, that might otherwise lead villagers to support a project that may not be in their best interests and which they have expressed objections to.

The capacity of PPSS to liaise with, but remain separate from, civil society organizations and activists at the state level has also been key to prolonging the project's progress and sustaining a context in which avenues of redress can still be pursued. India based activists have played a crucial role in translating the grievances of the affected communities through more formalized channels and acting in solidarity with, rather than on behalf of, the villagers. Odisha is a highly unusual context, in this sense, for its long history of anti-displacement activism and the strength of ideological alternatives available through the long-standing Left. The extent to which communities in different geopolitical and historical contexts have networks of this kind to draw upon and sustain their demands will be an important determinant of their capacity to successfully adopt similar strategies to those adopted by PPSS and its supporters.

Local legal support and progressive NGT

Of the formal channels that were pursued by activists and civil society organisations in support of the communities opposing the POSCO project, the domestic judicial avenues, though not successful, so far, in stopping the project altogether, have played the most important role in facilitating resistance to the project.

As discussed above, the complaints that were filed with judicial bodies and regulatory bodies, including the Odisha High Court and the NGT, were predominantly technical in nature, but driven by a fundamental opposition to the POSCO project. While the Odisha High Court, the Odisha State Pollution Control Board and the Ministry of Environment Forests, with the support of the Odisha state government, made a number of findings and judgments that appeared to disregard expert advice about the negative environmental and social impacts of the project, or found ways to ultimately work around those findings (for example by accepting state assurances that there are no outstanding OTFD applications), the NGT did more to take into account the concerns raised by complainants, within the boundaries of the law.

The NGT has emerged in the Indian judicial landscape over recent years as an important body in the advancement of an environmentally and socially progressive approach to industrial development

(Kothari, 2014; Gill, 2014).⁵² The NGT, under the NGT Act 2010, has powers to review both the *process* through which decisions regarding environmental and forest clearances were taken, and the *merit* of the decisions. The power to review the merit of decisions, and the staffing of the Tribunal with technical experts, are both new to the Indian judicial system. In its first two years it heard 185 cases and has contributed to the development of new jurisprudence on environmental matters that strengthen the requirements, in terms of content and process, for forest and environmental impact assessments and clearances (Dutta 2013). The emergence of a judicial body that, in mandate and practice, works to increase environmental standards associated with industrial development signals the availability of a new, important resource not only for addressing concerns directly about the environment, but also closely intersecting concerns to do with human rights, livelihoods, cultural protections and land rights, particularly in forest areas.

In turn, the possibility of making use of the NGT in this way depended upon the ability and willingness of local legal teams to provide pro bono support for litigants. In this regard, Prafulla Samantara of Lok Shakti Abhiyan, and the legal teams at LIFE have played a key role not only in this case, but also the Vedanta case. Availability and resourcing of essentially volunteer legal teams with the expertise and connections (with litigants) to take up these cases is therefore also crucial in making use of such avenues of justice.

Transnational multi-pronged solidarity

Though transnational civil society campaigns against POSCO have not been as crucial as domestic campaigns, they have played some role in contributing to resistance against the project.

Firstly, international supporters have been able to generate a level of expert support for affected communities that is difficult to mobilise locally. Most notably, expert support for alternative and credible research about the human rights situation on the ground (IHRC and ESCR-Net, 2013), and critique of POSCO's claims regarding environmental impact (Centre for Science and Environment, 2015) and financial benefit (MZPSG, 2010) have provided counter-points to the widespread claims in Odisha's media and from the government and the company about the impact of the project. Similarly, members of OECD Watch, including particularly SOMO, were instrumental in working with Odisha-based activist complainants through the OECD NCP process and providing support for them to develop and pursue their complaint through this unfamiliar and highly formalized avenue. These kind of expert assessments and assistance are resource-intensive and would be much more difficult to establish without international support. Though there has been no direct, identifiable impact on decision making in India, these reports contain the potential for such impact, and, with the NCP complaint, generate

⁵² See also Vedanta Case Study Report in this series.

pressure on POSCO to be more accountable for its action (and inaction) on an international stage. This is discussed further below.

Secondly, international supporters have been able to draw attention to the human rights concerns in POSCO's Odisha project in forums that activists in India often find more difficult to access, and which generate different and complementary forms of pressure to those applied locally, most notably the UN Working Group on Business and Human Rights, the OECD NCPs, investors, international media and media and society in Korea. Given the depth of support for POSCO at home in Korea and in the host country, these avenues of pressure have not led, so far, to any dramatic changes in POSCO's human rights practices in India. This is in contrast to, for example, the high levels of concern in the UK about Vedanta's human rights record in Odisha, which ultimately led to divestment from some high profile investors, and indirectly to further support for anti-Vedanta activists in India. It remains unclear, at this point, whether or not international pressure of this kind will have any more significant impact on investors or POSCO, given the lack of leverage that anti-POSCO campaigners have in terms of home or host country decision making. However, along with the material support provided above, this increasing international attention may facilitate the creation of opportunities for accountability through the international business and human rights regime, and it provides a degree of moral support for the activists and the movement in Odisha.

In addition to these two roles played by international civil society, it is important to note another unique feature of the role of international actors in the POSCO case. Often transnational civil society support carries with it significant risks, as well as benefits, for the community. Communities can find themselves embroiled in much larger agendas that extend beyond their particular case, and can find their own objectives difficult to reconcile with these broader agendas, in particular because of the relative differences in need for an urgent resolution. The big picture campaign can be sustained over many years, but it can be difficult for communities to sustain the same resistance (see the Wilmar and Weda Bay reports in this series). Conversely, some NGOs that become involved in anti-displacement cases prefer to provide support for communities to negotiate improved compensation packages and benefit sharing, and can, intentionally or unintentionally, push communities in this direction rather than support their ongoing refusal of the project altogether.

Arguably, one of the reasons the POSCO case has not witnessed this dynamic is because the community-level organization is strong and autonomous enough to enable PPSS to maintain a distance from its supporters, even at state level, but especially at the international level. The movement is not, therefore, subject to the same pressures from international actors. PPSS is able to maintain networks with these actors through a tight and cohesive Indian network of activists who play a pivotal role as intermediaries. In other words, the movement is able to enjoy the benefits of international support while mitigating many of its risks.

The requirement for intermediaries between the movement and its international supporters gives rise to concerns amongst some international supporters that they find it difficult to access 'authentic' or unfiltered views of community members, and thus struggle to identify a meaningful mandate to guide their support. While this can be a genuine cause for concern, the benefits of this arrangement for the movement have been considerable. Furthermore, where international organizations have a permanent local presence, building trust and communication with affected communities has been easier. For example, Mining Zone Peoples' Solidarity Network, which conducts research on the economic impact of the project, is run by Indian expatriates with pre-existing networks in Odisha, and has fostered an ongoing relationship with the anti-POSCO movement. This mode of networking can therefore be described, in this case, as being difficult but largely successful for the communities that oppose the project and for their movement.

What difference did the NCPs make?: The ambivalent effects of the international business and human rights regime

The UN Guiding Principles on business and human rights emphasise that grievance mechanisms should provide opportunities for learning (UNOHCHR, 2011: 34). Transnational civil society engagement with the POSCO case, and particularly the OECD NCP complaint, has inducted POSCO into the international business and human rights environment through engagement with the OECD Guidelines for Multinational Enterprises, and the UN Guiding Principles on Business and Human Rights, and associated UN Working Group on Business and Human Rights (as well as the Global Compact and ISO 26000). The evidence regarding the extent to which POSCO's engagement with international business and human rights practices has resulted in improved human rights protections or remedy is ambivalent.

POSCO's experience in India has been challenging for a company that is accustomed, because of its exceptional standing as a national icon in South Korea, to having its business plans facilitated rather than obstructed, by government and the wider community (Tipton and Hundt, 2006; Rhyu and Lew, 2011). Interviewees from POSCO report that prior to the Odisha project and the work of the various UN business and human rights processes, the company lacked any systematic approach to human rights, and was without a human rights policy, tools for conducting human rights due diligence, or any grievance mechanism(s) on its projects (Interview, POSCO, Seoul, November 2012).⁵³

In response to the significant resistance and associated bureaucratic and judicial hurdles the company has faced with its Odisha project, POSCO has sought to develop an approach to human rights. Throughout the period of this research (2012 to 2015) the company has informed the author that it is

⁵³ Names of interviewees from POSCO have been withheld at their request.

developing a human rights policy, a human rights checklist for due diligence, an internal grievance mechanism in POSCO-India, and that it is developing its approach to stakeholder engagement, including through seeking consultant advice from Price Waterhouse Coopers (Interview, POSCO, Seoul, November 2012; Private communication from POSCO, June 2015). At the time of writing (May 2015), only a brief set of bullet points under the heading ‘human rights management’ in the company’s ‘Standard of Conduct’ policy, part of its Business Ethics Policy, is publicly available as evidence of a company-wide approach to protecting human rights (POSCO, 2015e).⁵⁴ Internally, POSCO’s sustainability section carries responsibility for human rights compliance, but admitted its own inexperience in this area (Interview, POSCO, Seoul, November 2012). As a result of the challenges to the project in Odisha, and its growing awareness of the UN Business and Human Rights framework, POSCO personnel suggest that the company has also reached out to the business and human rights community to help them, because the company is “studying the human rights now, we are looking for the way to assess the guiding principle of general framework” (Interview, POSCO, Seoul, November 2012). POSCO joined the Global Compact, and attends the UN Business and Human Rights Working Group meetings each year in Geneva. Through its engagement with these global initiatives, POSCO has learnt more of the language of human rights and has been prompt and consistent in its responses to criticism of its activities, for example through the Business and Human Rights Resource Centre website, and in its press releases responding to reports such as the ESCR-Net and NYU ‘Price of Steel’ report (POSCO India, 2013b). In particular, POSCO has engaged with the Dutch NCP in discussions regarding dialogue with the affected communities and the possibility of a review assessment panel, as described above. The company has won at least one Corporate Social Responsibility award, though this primarily highlights their governance structure rather than their human rights record (POSCO 2015b).

Despite its engagements with these initiatives, there is no publicly available evidence that POSCO has addressed any of the substantive human rights issues associated with its project in Odisha. Violence, intimidation and coercion continue to take place in Jagatsinghpur, and the land is being acquired without adequate consultation, and without consent of the affected communities, as described elsewhere in this report. To our knowledge, there have still been no human rights due diligence processes or independent fact-finding mission to determine the current or future human rights impact of the project. POSCO’s commitments, then, have not so far translated into any changed approach to human rights on the ground. For example, the POSCO website states that “POSCO finds that the protests

⁵⁴ The human rights management policy section consists of the four following points: “We will respect human rights as fundamental rights of mankind, and support internationally recognized human rights standards; We will conduct due diligence to enable implementation of management system that respects human rights; We will respect basic rights of employees guaranteed by international standards and local laws; We will make a good faith effort to timely discuss and resolve human rights related complaints and problems raised against us” (POSCO 2015a). The POSCO-India website states that a grievance mechanism will be established once a compensation package is agreed, and in the meantime it is the government’s responsibility to address “any small grievances” (POSCO-India 2015a).

are basically orchestrated by anti-project miscreants. Their support base in the surrounding villages is almost negligible”(POSCO-India 2015a) despite evidence to the contrary, outlined throughout this report. The company continues to deny there is any problem, or dismisses its significance by making overly simplified statements, for example that “POSCO does not believe in violation of human rights”(IHRC and ESCR-Net, 2013: 78; POSCO-India 2015a), and that because it is a signatory to the Global Compact and the OECD Guidelines, its commitment to “respecting the rights of the local community is uncompromising and unfaltering,” (IHRC and ESCR-Net, 2013: 78) without providing further information on steps being taken to address the human rights concerns raised by their activities in Odisha.

The extent and significance of POSCO’s adoption of human rights policies and practices, and the impact of the OECD NCP complaint is therefore difficult to interpret. So far, POSCO’s commitments to international human rights standards have not provided an *effective* avenue for seeking redress for human rights harms or mitigation of human rights risks. Instead, the NCP process has been one through which POSCO has arguably begun to strengthen its position vis-à-vis the international community by being able to represent itself as a responsible corporate citizen, without making concomitant changes to its operations and business practices.

In sum, it is not clear from this case that international business and human rights tools, including the NCP, have contributed positively to addressing the grievances introduced in the beginning of this report. In addition to not acting as an effective avenue for addressing narrowly interpreted human rights harms and risks, the international business and human rights regime provides little space in which the aggrieved communities and their supporters can articulate the expanded form of their grievance, which concerns broader claims for a people-centred development agenda, and have it taken seriously. As one Indian activist put it, when dealing with the NCPs, “It’s your institution, your agenda and we’ll come to you – it’s very hierarchical. We want to do it the other way around.”

Lessons learnt

The following section summarises the lessons learnt from the POSCO case for different groups of actors regarding the possible uses and limitations of non-judicial, transnational grievance mechanisms, particularly the OECD NCPs, in advancing opportunities for resisting and achieving remedy for human rights harms.

For OECD National Contact Points

- **Functional equivalence and coordination of NCPs**

The Norwegian and Korean NCPs took an uncoordinated approach to this case, despite receiving the same complaint, and despite the Dutch NCP's efforts to facilitate coordination. Furthermore, the Korean NCP did not adhere to the principles of functional equivalence outlined in the OECD Guidelines on Multinational Enterprises. If the three NCPs that were approached with this case were well coordinated and functionally equivalent (at the robust level of the Dutch and Norwegian NCPs), the complaint could potentially have built more momentum around the review assessment panel, and the NCP process could have made a positive contribution to human rights fulfilment in this case. Instead, the NCP process has not had any positive effect on this particular case.

- **Investigative capacity**

Investigative capacity is important to alleviate imbalances and uncertainty in information, and therefore also power. The Dutch NCP's attempts to facilitate a fact-finding process represent an important innovation in the potential contributions of the NCP processes. Though the mission did not succeed in this case (see immediately below), this is a function that should be explored further in future NCP specific instances.

- **Risks of dialogue**

The Dutch NCP applied significant pressure on the complainants in this case to engage in a dialogue with POSCO and the Dutch pension fund. Though the NCP sought to establish a sufficiently independent, robust and authoritative review assessment panel to provide a more independent basis for discussions, when this could not be agreed, the NCP continued to push for dialogue. This was despite the absence of the safeguards necessary to ensure that dialogue did not disadvantage the complainants further than they are already disadvantaged.

In future, NCPs should desist from pressuring for dialogue in the absence of such safeguards. One possible way to begin to generate such safeguards is by exploring other options for provision of assistance. This may require, for example, a willingness to engage with complainants 'on their territory', in places and modes that are more comfortable for them, and in which their freedom to speak is not unduly constrained by the presence of company or government actors (in effect, the companies already

enjoy this arrangement by virtue of having the resources to meet with the NCPs, and being 'at home' in the professional milieu in which NCPs operate). Reaching out to complainants in this way may generate alternative ideas and suggestions for addressing human rights complaints that are more sensitive to local context, and which do not depend on dialogue and associated disadvantage.

- **Political economy**

In order for NCPs to make an informed assessment about a specific instance, and about what role an NCP process could or should play in a given specific instance, it is necessary to have some understanding of the political economy and context of a complaint. In the POSCO case, such an understanding would have shed light on why the complainants are unwilling to engage in a dialogue with POSCO at present, and why a review assessment panel could be an important first step in working through the complaint.

For communities and their supporters

- **Autonomous and strong communities are key**

When a community is united, strong and resilient, it can exercise considerable leverage. Though all communities need support at national and international levels, a strong and united community can control this kind of support, rather than be controlled by it.

- **Transnational and national civil society networks help but can be challenging**

National and international civil society organisations can provide vital support and can access forums through which pressure can be applied that are often inaccessible to directly affected communities, for example investors. It is therefore helpful to find allies in national and international civil society networks to help with this work.

If these networks can connect with a well organized and credible organization that represents the community, that can make it easier to work together.

However, partnering with national and international organisations can also lead to tensions. These bigger organisations are likely to be dependent upon local activists and community organisations for accurate and credible information that can help them campaign or lodge a complaint with local groups, which puts pressure on local organisations. Conversely, local organisations need international supporters to understand and support their goals, as decided by them, and need to be able to trust that international organisations will pursue these goals and not others.

Though these demands can make international networking difficult, they can also lead to very successful partnerships in which the different strengths of different groups contribute to a stronger overall campaign. Civil society groups should be prepared to sensitively negotiate these challenges, as the European and Korean groups did in the NCP process.

- **Multi-pronged strategies are more effective than single avenues**

An effective strategy for seeking redress for a human rights grievance is likely to require a multi-pronged strategy that engages formal and informal channels, national and transnational. No single avenue is likely to guarantee rights fulfilment, but using multiple avenues at once can create time and opportunities for other avenues to work more effectively. For example, non-violent direct action and political protests can buy time in a land acquisition process for legal activists to mount a judicial case.

- **Cooperation and negotiation carry risks**

Transnational, non-judicial mechanisms typically require complainants to cooperate with a company and enter a dialogue or negotiation. Though this can be helpful in some cases, it can also weaken the complainant's position as the company is able to present itself as a good corporate citizen. Before engaging in a process that will require negotiation of this kind, communities and their supporters should consider the risks and possible benefits and weigh them up against the communities' objectives.

- **Information and evidence are vital**

Companies and governments may not provide adequate information about the impact of a project. If this is the case, communities should build their capacity to collect evidence of human rights harms or other concerns. International organisations can be helpful, as they often have more resources to conduct assessments that can serve as a counterpoint to company or government information.

For business

- **Engagement in the international business and human rights field**

Over recent years standards regarding business conduct in relation to human rights have become increasingly codified and more widely accepted in the business community. Businesses can expect to be held accountable to these standards wherever they operate in the world, through a range of mechanisms including the OECD NCPs, where the host or home country is an OECD nation.

Businesses should therefore familiarise themselves with these standards, and rapidly increase their capacity to meet their human rights obligations, for example through being able to conduct human rights due diligence assessments, and finding strategies for engaging governments that are involved in human rights abuses that relate to the corporation's activities.

- **Understanding of local context**

When businesses seek to expand their operations abroad, they need to understand the local political, economic, social and historical context in order to anticipate bureaucratic and legal hurdles, and, more importantly, to anticipate human rights risks and mitigate them. Due to its sensitivity and the severity of the human rights risks, particular attention should be paid to contexts that will entail land acquisition.

- **Corporations can be held accountable for state-inflicted human rights harms**

The UN Guiding Principles on Business and Human Rights as well as the OECD Guidelines and other international standards relating to business and human rights stipulate that corporations are responsible for human rights harms in which they are complicit. If state officials are inflicting human rights harms for reasons related to corporate activity, it is incumbent upon the corporation to, firstly, actively seek to prevent that harm, and, as a second-best option, contribute to redress if the harm has already taken place.

- **Minority shareholders can be required to exercise some (limited) leverage**

It is now established that minority shareholders can be held accountable, through the OECD NCP process, for their human rights due diligence, and efforts (or lack thereof) to exercise leverage over companies in which they are invested if those companies are alleged to be engaged in human rights harms.

- **Formal commitments should be matched by meaningful changes in business practices**

Commitments to voluntary schemes such as the Global Compact and ISO 26000 need to be accompanied by meaningful changes in business practices that go beyond reporting and policy development. Companies must engage in these voluntary schemes in good faith and seek to actively and rapidly change and improve their business practices to comply with the spirit, and not only the letter, of these standards.

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