

INITIAL ASSESSMENT

**Notification and request for mediation to the South Korean, Norwegian and
Netherlands National Contact Points for the OECD Guidelines for Multinational
Enterprises
18 JANUARY 2013**

EXECUTIVE SUMMARY

On 9 October 2012 Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance and Forum for environment and development notified a specific instance with the National Contact Points of South Korea, Norway and the Netherlands with regard to an alleged breach of the OECD guidelines for Multinational Enterprises (hereafter: the Guidelines) by South Korean Pohang Iron and Steel Company (Posco) and two of its investors; the Dutch pension fund ABP and its pension administrator APG and the Norwegian Government Pension fund Global¹.

The Netherlands NCP concludes that the notification concerning ABP/APG merits further consideration based on the following criteria:

- the notifying parties are concerned parties with a legitimate interest in the issues raised in the notification;
- ABP and APG are multinational enterprises in the sense of the Guidelines;
- the issues related to ABP and APG are material and substantiated;
- there is a link between the enterprise's activities and the issues raised in the specific instance;
- the consideration of this specific instance contributes to the Guideline objectives and effectiveness.

The decision to further examine this specific instance does not entail a substantive research or fact finding nor does it entail a judgement on whether or not the company in question has violated the Guidelines.

The Netherlands NCP will seek to collaborate with the Norwegian and the Korean NCP to further investigate the notification and to offer mediation to all parties involved.

In conformity with the Netherlands NCP's procedure², the provisional initial assessment has been sent to the parties involved, inviting them to respond to the assessment in writing within a two – weeks notice, after which the provisional initial assessment has been determined and published on the NCP's website www.oecdguidelines.nl.

SUMMARY OF THE NOTIFICATION

On 9 October 2012 the Netherlands NCP received a notification against ABP and APG for not having taken the appropriate steps to prevent or mitigate negative impacts related to their activity through their business relationship with Posco.

The notification against ABP/APG entails the alleged non-observance of OECD Guidelines Chapter II, commentary 19 and 22. In a clarification of the specific instance by mail of 23 November 2012 the notifying parties submitted additional information on the alleged

¹ On 17 October 2012 notifying parties have changed the Norwegian addressee of their notification into Norwegian Bank Investment Management (NBIM).

² Attachment II: The Netherlands NCP procedure

breach by ABP/APG. Notifying parties refer to Chapter II, section A, paragraph 12 of the Guidelines where enterprises are expected to "seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship".

The notifying parties request that ABP/APG should *increase* their efforts to use their leverage in order to influence Posco. Furthermore notifiers request the public disclosure of minimum criteria for the continuation of the investment in Posco by ABP/APG. In addition the South Korean, Norwegian and Netherlands NCP are asked to carry out an independent fact finding mission in order to examine the issues raised in this specific instance.

The notification also entails an alleged breach of the guidelines by Posco for failing to seek to prevent or mitigate human rights impacts, failing to conduct comprehensive human rights due diligence and failing to carry out environmental due diligence in its project to set up a steel plant in the Jagastinghpur District in Odisha, India, which is carried out by the wholly owned subsidiary Posco India Private Limited.

THE NETHERLANDS NCP ASSESSMENT

In accordance with the OECD Guidelines and the Dutch NCP Survey for handling notifications, the Netherlands NCP concludes that the notification merits further examination, after analysing the following considerations:

Is the Netherlands NCP the right entity to assess the alleged violation?

The notification is submitted to three NCP's; the South Korean NCP is the right entity to assess the alleged breach by Posco, the Norwegian NCP is the right entity regarding NBIM and the Netherlands NCP is the right entity to assess the alleged breach by ABP/APG. The Netherlands NCP has agreed with the Norwegian and South Korean NCP to cooperate throughout the dealing with this specific instance as well as support the other NCP's.

What is the identity of the reporting party and its interest in the case?

Fair Green and Global Alliance (FGG) is a Dutch civil society organization (CSO) with a broad international network who aims to support local communities in the Southern hemisphere whose livelihood is threatened by the exploitation of human and natural resources. FGG seeks to enhance the capacity of local communities and their CSO's to influence decision making process on national and international level. In this specific instance FGG is represented by the non-profit organizations SOMO and Both Ends. SOMO is an independent research and network organisation who investigates multinational enterprises and the consequences of their activities for people and the environment. Both Ends is an independent NGO that aims to strengthen Southern CSO's by supporting strategic networks and by monitoring, analyzing and lobbying for sustainable capital flows. Hence the NCP finds that the notifying parties have a legitimate interest in the matter submitted to the NCP.

Are ABP and APG multinational enterprises according to the Guidelines?

Stichting Pensioenfonds (ABP) is the Dutch pension fund for employees in the government, public and education sectors. With an invested capital of € 274 billion, ABP is one of the largest pension funds in the world and holds a substantial position in the capital market. In addition to headquarters in The Netherlands ABP has offices in New York, Hong Kong and London. Algemene Pensioengroep N.V. (APG) forms part of the APG Group which operates globally with offices in the Netherlands and subsidiaries in Hong Kong and New York. APG is one of the world's largest administrators of group pension schemes with approximately 4.000 employees. APG administrates over 30% of all

collective pension schemes in the Netherlands and manages pension assets of in total approximately 315 billion Euro. APG manages the pension capital of ABP.

Is the issue material and substantiated?

The notification against Posco refers to relevant provisions of the Guidelines³ and is substantiated with facts.

The issues raised in the specific instance concerning ABP/APG entail the alleged non-observance of OECD Guidelines Chapter II, commentary 19 and 22. Notifying parties have substantiated the notification concerning the alleged breach by ABP/APG and NBIM to the Norwegian and Netherlands NCP. In a clarification of the specific instance by mail of 23 November 2012 the notifying parties submitted additional information, referring to Chapter II, section A, paragraph 12 of the Guidelines and paragraph 14, 20, 22 in the Commentary of General Policies. The Netherlands NCP finds that the notification refers to relevant provisions in the OECD guidelines text and commentary and is substantiated with facts.

Does there seem to be a link between the enterprise's activities and the issue raised in the specific instance?

The issues raised in relation to ABP/APG concern their responsibility to prevent or mitigate negative impacts related to their activity through their business relation with Posco. APG manages the pension capital of ABP and holds a share in Posco. While the share of 17 million EURO is relatively small, APG is leading a coalition of other shareholders and acknowledges to have sufficient leverage to effect change in the practices of Posco. Hence the Netherlands NCP is of the opinion that there is a link between ABP/APG's activities and the issues raised in the notification.

What is the relevance of applicable legislation and procedures, including court rulings;
There are no relevant parallel procedures identified at this stage

How are similar issues addressed by other domestic or international proceedings;

The notifying parties refer to the INTEX and CERMAQ cases, submitted to the Norwegian NCP, and the Vedanta case, submitted to the UK NCP. In the specific instance against INTEX (2009) the Norwegian NCP concluded that the company should consult local communities and be more transparent about environmental impacts. The notification against CERMAQ (2009) resulted in a joint statement between the company and the notifiers about good corporate governance, e.g. the sustainable use of natural resources. In the Vedanta case the UK NCP recommended in its final statement that the company should engage in a dialogue with the local communities and perform a human rights due diligence.

Would the consideration of this specific problem contribute to Guideline objectives and effectiveness.

The NL NCP finds that dealing with this notification and requests would contribute to the purpose and effectiveness of the Guidelines by contributing to clarify the due diligence recommendations for the financial sector.

CONCLUSION

The NCP is of the opinion that this specific instance merits further consideration and will therefore, in accordance with the Netherlands NCP specific instance procedure, offer its good offices to facilitate a dialogue between the parties.

³ OECD Guidelines for Multinational Enterprises Chapter IV (Human Rights), paragraph 1,2,5; Chapter II (General Policies) , paragraph A. 10,11,14 and Chapter VI (Environment), paragraph 3

ANNEX I: THE NETHERLANDS NCP PROCEDURE IN THIS SPECIFIC INSTANCE:

On 9 October 2012 the Netherlands NCP has received a specific instance against the Dutch pension fund ABP and asset manager APG for not having taken the appropriate steps to prevent or mitigate negative impacts related to their activity through their business relationship with Posco.

On 15 November 2012 the Netherlands NCP invited parties to comment upon the notification. On 23 November 2012 the notifying parties further clarified the notification and submitted additional information on the alleged breach by ABP/APG. On 26 November 2012 the NCP met with the notifying parties. On 27 November 2012 the NCP met with APG. NCP was informed by APG that APG will represent ABP in this specific instance.

ANNEX II: THE NETHERLANDS NCP PROCEDURE

ANNEX III: DETAILS OF THE PARTIES

THE COMPANY

Stichting Pensioenfonds (ABP) is the Dutch pension fund for employees in the government, public and education sectors. With an invested capital of € 274 billion, ABP is one of the largest pension funds in the world and holds a substantial position in the capital market. In addition to headquarters in The Netherlands, ABP has offices in New York, Hong Kong and London. Algemene Pensioengroep N.V. (APG) forms part of the APG Group which operates globally with offices in the Netherlands and subsidiaries in Hong Kong and New York. APG is one of the world's largest administrators of group pension schemes with approximately 4.000 employees. APG administrates over 30% of all collective pension schemes in the Netherlands and manages pension assets of in total approximately 315 billion euros. APG manages the pension capital of ABP. APG holds a share of 17 million EURO in Posco.

THE NOTIFYING PARTY

The notifying party, Fair Green and Global Alliance (FGG), is a Dutch civil society organization with a broad international network who aims to support local communities in the Southern hemisphere whose livelihood is threatened by the exploitation of human and natural resources. FGG seeks to enhance the capacity of local communities and their civil society organizations (CSO's) to influence decision making process on national and international level. In this specific instance FGG is represented by the non-profit organizations SOMO and Both Ends. SOMO is an independent research and network organisation who investigates multinational enterprises and the consequences of their activities for people and the environment. Both Ends is an independent NGO that aims to strengthen Southern CSO's by supporting strategic networks and by monitoring, analyzing and lobbying for sustainable capital flows.

ANNEX IV: THE NOTIFICATION

ANNEX V: RESPONSE BY THE COMPANY

APG is fully aware of the situation concerning the project of Posco in Jagastinghpur District, Odisha and the conflict between Posco and the local communities. APG is in close contact with the notifying parties regarding the issues raised in the notification and has expressed its willingness to cooperate with the notifiers to the fullest extent possible. APG has addressed the issue with Posco in order to realize a stakeholder dialogue which would include the local communities and government. According to APG, Posco would be willing to cooperate. While APG is only holding a small share of 18,6 million Euro in Posco (Q3 2012), it is leading a coalition of other shareholders and acknowledges to have sufficient leverage to effect change in the practices of Posco. So far (and despite the efforts of APG) the stakeholder dialogue has not been realized. According to APG, the

local communities are reluctant to engage in a dialogue with Posco and it is important to identify the right partners on government level.

ANNEX VI: FURTHER CLARIFICATION BY NOTIFYING PARTIES OF 23 NOVEMBER 2012

Specific Instance
OECD Guidelines for Multinational Enterprises

POSCO

Concerning POSCO's human rights and environmental breaches in relation to the proposed development of an iron ore reserves, an integrated steelworks plant and associated infrastructure in the State of Odisha, India

Complainants

Lok Shakti Abhiyan (India)
Korean Trans National Corporations Watch (South Korea)
Fair Green and Global Alliance (Netherlands)
Forum for Environment and Development (Norway)

Presented to:

Korean OECD National Contact Point

Ministry of Knowledge Economy
Foreign Investment Policy Division
1 Jungang-dong, Gwacheon-si, Gyeonggi-do
Tel: +82-2-2110-5356
Fax: +82-2-504-4816
fdikorea@mke.go.kr
www.mke.go.kr

Dutch OECD National Contact Point

Trade Policy and Globalisation Division
Ministry of Economic Affairs, Agriculture and Innovation
Alp. N/442, P.O. Box 20102
NL-2500 EC The Hague
Tel: +31-70-379-8617
Fax: +31-70-379-7221
ncp@minez.nl
www.oesorichtlijnen.nl

Norwegian OECD National Contact Point

Ministry of Foreign Affairs
P.O. Box 8114 – DEP
N-0032 OSLO
Tel: +47-22-24-4599 and +47-22-24-4237
her@mfa.no and mban@mfa.no
www.responsiblebusiness.no

Table of Contents

- Interested parties.....3
 - 1. Lok Shakti Abhiyan3
 - 2. Korean Trans National Corporations Watch (KTNC Watch)3
 - 3. Fair Green and Global Alliance3
 - 4. Forum for Environment and Development | Forum for utvikling og miljø (ForUM)4
- Entities named in this specific instance5
 - 1. POSCO (South Korea)5
 - 2. ABP/APG.....5
 - 3. The Government Pension Fund - Global (Norway).....6
- Introduction7
- What is at stake.....7
- Latest developments.....8
- key Background information9
 - 1. About the “Saxena” and “Meena Gupta” Committees9
 - 2. Land acquisition and Scheduled Tribes or Other Traditional Forest Dwellers10
- Breaches to the Guidelines11
 - 1. Failure to seek to prevent or mitigage adverse impacts directly linked to their operations and exercise their leverage to protect human rights11
 - 2. Failure to conduct comprehensive human rights due diligence, including consulting with and preventing harm to affected communities.....15
 - 3. Failure to carry out environmental due diligence, including consulting with and informing affected communities16
- Other proceedings20
- Complainants’ requests of NCPs.....22
- Videos.....25
- Acronyms26
- Endnotes27

INTERESTED PARTIES

1. Lok Shakti Abhiyan

Lok Shakti Abhiyan is an alliance of progressive people's organisations and movements, who while retaining their autonomous identities, are working together to bring the struggle for primacy of rights of communities over natural resources, conservation and governance, decentralised democratic development and towards a just, sustainable and egalitarian society in the true spirit of globalism.

Prafulla Samantara
Lohiya Academy, A/3, Unit – 9
Bhubaneshwar, Orissa – 751022
India
Cell: +91-94372-59005
psamantara@rediffmail.com

2. Korean Trans National Corporations Watch (KTNC Watch)

KTNC Watch is a network of NGOs¹ based in Korea working in various fields ranging from human rights and corporate social responsibility to energy/climate policy and labour rights. The network was formed with the view to bring together various expertise and experience to monitor transnational corporations registered in Korea and address issues arising from their operations.

KTNC Watch
2nd Fl., 184-2 Pirun-dong
Jongno-gu, Seoul 110-044
South Korea
Tel: + 82-2-736-5808/09
Fax: + 82-2-736-5810
Contact: khis21@hanmail.net

3. Fair Green and Global Alliance

Fair Green Global Alliance is an alliance of Dutch civil society organisations.² The overall objective of the FGG alliance is to contribute to poverty reduction and socially just and environmentally sustainable development by enhancing the capacity of civil societies in the South.

Fair Green Global Alliance
Sarphatistraat 30
1018 GL Amsterdam
The Netherlands
+ 31-20-639-1291
Contact: info@somo.nl

4. Forum for Environment and Development | Forum for utvikling og miljø (ForUM)

ForUM is a think tank and national and international contact point for the coordination of policy initiatives and recommendations. These are anchored in a community of 54 member organisations in Norway and the viewpoints of our international partners and those in the Global South.

ForUM

Storgata 11

0155 Oslo

Norway

Tel: +47-23-01-0300

Fax: +47-23-01-0303

<http://www.forumfor.no/>

Contact: forumfor@forumfor.no

ENTITIES NAMED IN THIS SPECIFIC INSTANCE

1. **POSCO (South Korea)**

POSCO (formerly Pohang Iron and Steel Company) is a South Korea-based company engaged in the manufacture of steel products. It is the fourth largest steel company in the world. POSCO-India Pvt. Limited is a wholly-owned subsidiary of POSCO.

Jun Yang Jung, Chairman & CEO
POSCO
1, Goedong-Dong
Nam-Gu
POHANG, 790300
South Korea
Tel: +82-54-220-0114
Fax: +82-54-220-6000
Press Center: webmaster@posco.co.kr
www.posco.com and
<http://www.posco-india.com/>

2. **ABP/APG**

Stichting Pensioenfond ABP (National Civil Pension Fund) is the pension fund for employees in the government, public and education sectors in the Netherlands.

Henk Brouwer, Chairman
ABP
Head office Heerlen
Oude Lindestraat 70
6411 EJ Heerlen
Netherlands
Tel: +31-45-579-9111
pensioenen@abp.nl
<http://www.abp.nl/>

APG carries out the administration of pensions for approximately 2.6 million Dutch people, including ABP's assets.

Drs. Dick Sluimers, CEO
APG
Oude Lindestraat 70
6411 EJ Heerlen
Netherlands
Tel: +31-45-579-9222
corporate.communicatie@apg.nl
<http://www.apg.nl/>

3. The Government Pension Fund - Global (Norway)

The purpose of the Government Pension Fund - Global (GPF) is to facilitate government savings necessary to meet the rapid rise in public pension expenditures in the coming years, and to support a long-term management of petroleum revenues in Norway.

Sigbjørn Johnsen, Minister of Finance

Ministry of Finance

P.O. Box 8008 Dep

NO-0030 Oslo

Norway

Tel: +47-22-24-9090

Fax: +47-22-24-9514

postmottak@fin.dep.no

<http://www.regjeringen.no/en/dep/fin.html>

INTRODUCTION

We, Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance and ForUM (Complainants), hereby file a Specific Instance concerning POSCO's breaches to the *OECD Guidelines for Multinational Enterprises* (Guidelines) in relation to the proposed development of iron ore reserves, an integrated steelworks plant and associated infrastructure in the State of Odisha, India.

POSCO has not carried out comprehensive human rights and environmental due diligence, and it has not engaged in meaningful consultation with all affected communities to identify the full scope and severity of potential human rights, social and environmental impacts. POSCO's failure to conduct due diligence will mean the company will be incapable of preventing or mitigating significant adverse impacts on thousands of people and the environment should its proposed project proceed.

Specifically, POSCO is alleged to have breached the Guidelines by failing to:

- 1) seek to prevent and mitigate human rights abuses directly linked to their operations and exercise their leverage to protect human rights;
- 2) conduct comprehensive human rights due diligence, including consulting with and preventing harm to affected communities; and
- 3) carry out comprehensive environmental due diligence for all aspects of its proposed project, including consulting with and informing affected communities about the project's actual and potential impacts.

The Dutch pension fund ABP/APG and Norwegian Government Pension Fund – Global (GPF) should seek to prevent or mitigate the real and potential adverse impacts directly linked to their operations through their financial relationships with POSCO.

WHAT IS AT STAKE

POSCO and its wholly-owned subsidiary POSCO India Pvt. Limited are seeking to extract and process an estimated 600 million tons of iron ore reserves in the State of Odisha³, India. POSCO's original plan involves building a 12 million tons per annum (MTPA) integrated steelworks plant in the Jagatsinghpur District (10 km south of Paradip Port). The integrated steel plant will include a captive power plant⁴ and a captive minor port⁵. POSCO also plans to develop related infrastructure (such as roads and railways and possibly conveyor belts in lieu of some roads) to transport 20 MTPA iron ore from the mines to the plant.⁶ An integrated township is also planned.⁷

POSCO claims the project is "expected to bring about meaningful growth and investment in India, and would also further downstream industries like automobile, shipping and construction". POSCO also claims "India will derive significant benefits from the POSCO India project, as it will create an estimated 48,000 direct and indirect jobs in the region. In addition, the construction phase will create about 467,000 man years of employment for the local population".⁸ However, there is little possibility the purported job creation will benefit the thousands of local residents who do not have the skills to work for a steel plant and offspring industries that will allegedly be created.

The project originally involved the Odisha State Government acquiring 4,004 acres of land, including 438 acres of private land. In this regard, according to 2001 census data, the acquisition of 438 acres of private land would result in 3,578 families losing their land through forced eviction, either entirely or partially, and 718 families losing their homes.

However, it is important to understand that the State Government claims the 4,004 acres slated for POSCO's project is government-owned, but the communities have lived and subsisted on these lands for generations, including individuals who have special legal protections under the Scheduled Tribes or Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (hereafter "Forest Rights Act 2006" or "FRA")⁹.

Indeed, the Gram Panchayats of Dinkia, Nuagaon and Gadakujang are sited primarily in the proposed project site. These Gram Panchayats include 11 villages. As per the 2001 Census, there were 3,350 households with a total population of approximately 22,000 people living in these three Gram Panchayats. However, PPSS estimates the total number of households that will be affected today is about 4,000.

In addition, approximately 75% of the total land allotted for the proposed project is forest land. These communities depend on the surrounding forest land and coastal ecosystem for food such as rice, vegetables, fruits and fish, but also for the cultivation of cash crop such as betel vine and cashew. Their farming and fishing practices have allowed many community members to maintain a peaceful and sustainable way of living for generations.

LATEST DEVELOPMENTS

- On 30 March 2012, the National Green Tribunal (NGT) suspended POSCO's final 2011 environmental clearance.¹⁰ The NGT ordered the Ministry of Environment and Forests (MoEF) to carry out a "fresh review" by a newly-formed committee of "subject matter specialists for better appreciation of environmental issues". POSCO, for its part, "shall be asked to furnish relevant details required for the said review by the newly constituted committee to recommend specific conditions to be attached/revise in the [environmental clearances] granted by MOEF".¹¹ (Appendix A – See Pgs. 31-32, Paras. 8.1 – 8.9)
- In July 2012, POSCO "submitted a revised proposal to the [Odisha State Government] seeking transfer of 2,700 acre land in its favour for establishing a 8 MTPA factory" instead of the original 4,004 acres of land for a 12 MTPA power plant.¹² POSCO has stated "it will expand the capacity to [the] envisaged 12 [MTPA] when it is provided the rest [of the] land".¹³
- Also in July 2012, the Odisha State Government announced it "has decided against acquiring about 438 acres of private land for the 12 [MTPA] steel plant proposed to be set up by [POSCO] near Paradip".¹⁴
- On 22 August 2012, the MoEF review committee established in response to the NGT's order visited the Noliasahi and Nuagaon villages.¹⁵ According to local community activists, no prior notice of the committee's visit was provided, and in fact they only learned of the visit after it was reported in the media. According to media reports, the committee members also met with state officials.

- As of 6 September 2012, the Odisha State Government is reportedly set to acquire the final 700 acres of government land needed for an 8 MTPA factory. According to media reports, “The land will be given to the South Korean steelmaker in October and construction could begin by the end of the year”.¹⁶
- If and when POSCO obtains a new environmental clearance from the MoEF per the NGT’s order, the Odisha State Government is set to approve a new Memorandum of Understanding (MoU) with POSCO (the original 2005 MoU expired in June 2011).

It is our understanding POSCO actually intends to commence construction in October 2012. We therefore request urgent attention is given to the issues raised in this Specific Instance.

KEY BACKGROUND INFORMATION

1. About the “Saxena” and “Meena Gupta” Committees

Two government-appointed committees – commonly referred to as the “Saxena Committee” and “Meena Gupta Committee” – conducted field investigations of the POSCO project in 2010.

The Saxena Committee was commissioned by the MoEF and the Ministry of Tribal Affairs (MoTA) to examine the wider implementation of the FRA and other issues in the State of Odisha. Three members of the Saxena Committee issued a scathing report in August 2010 on the FRA implementation relative to the POSCO project. Please see Appendix B, “MoEF/MoTA Committee on Forest Rights Act: Report of visit to Jagatsinghpur (site of proposed POSCO project), Orissa, 23-24 July 2010”.

In response to the Saxena Committee’s report, the MoEF appointed a four-member committee led by former State Environment Secretary Meena Gupta to “[E]nquire into the status of implementation of FRA in and around forest land of the POSCO project and rehabilitation and resettlement provisions. Subsequently, the committee was asked to review the environment, [Coastal Regulation Zone] and other clearances also given by MoEF and state and local authorities”.¹⁷

While the four members agreed the FRA had not been implemented, they could not come to a joint conclusion on all the issues they were commissioned to investigate. Therefore, two reports were issued: one by Meena Gupta and a second by a majority of the members, Dr. Urmila Pingle, Dr. Devendra, and Pandey, Dr. V. Suresh (hereafter referred to as the “Meena Gupta Majority Report”). Please see Appendix C, the Executive Summary for the “Report of the Committee Constituted to investigate into the proposal submitted by POSCO India Pvt. Limited for establishment of an Integrated Steel Plant and Captive Port in Jagatsinghpur District, Orissa, October 18, 2010”.

Many of the allegations contained in this Specific Instance are corroborated by the findings of these committees.

2. Land acquisition and Scheduled Tribes or Other Traditional Forest Dwellers

The Odisha State Government has sought to acquire the land POSCO needs for its project under the Land Acquisition Act 1894, which was created with the expressed purpose of facilitating the government's acquisition of privately held land for public purposes. However, when Scheduled Tribes or Other Traditional Forest Dwellers (OTFDs) reside in the area, the Forest Rights Act 2006 applies.

Under the FRA, OTFDs is defined as any member or community who has for at least three generations prior to the 13 December 2005 primarily resided in or who depends on the forest or forest land for bona fide livelihood needs. One generation refers to a 25-year period. Similarly, Scheduled Tribes refers to indigenous people who are specially protected by the Indian Constitution. The FRA requires the free, prior and informed consent of the appointed village council before land can be acquired from these protected classes like Scheduled Tribes and OTFDs. Two issues have been raised with regard to the FRA. The first issue is whether Scheduled Tribes or OTFDs, who under Indian law hold forest rights, reside in the project area. The second issue is whether their free, prior and informed consent was obtained in a legally valid manner.

In August 2010, three members of the MoEF/MoTA Committee (also referred to as the "Saxena Committee") issued a highly critical report on the implementation of the FRA with respect to POSCO's proposed project (Appendix B). The Committee concluded, among other things (**emphasis below was not added**):

1. ***There are Other Traditional Forest Dwellers (OTFDs) in the area***, contrary to what the district administration is saying. Both documentary and oral evidence exists to this effect. A sample of the documentary evidence has been attached with the letter sent by the Committee to the Minister for Environment and Forests, on 3 August 2010.
2. The FRA process has not been completed, in fact it has not proceeded beyond the initial stages, for various reasons. ***It is therefore incorrect and misleading for the district administration to conclude that there are no OTFDs "in cultivating possession of the land since 3 generations" in the area.*** Firstly, this cannot be concluded without having gone through the process of claims; secondly, the FRA provides for dependence on forest land also as a criteria for eligibility, not only "cultivation possession of land".
3. Some palli sabhas have given ***resolutions refusing to consent to diversion of forest land*** on which they are dependent. These palli sabhas were convened by the district administration itself, after receiving instructions relating to the MoEF circular of July 2009, which indicates that the administration was aware of the possible presence of forest rights claimants in the area. (It is interesting that this was done *after* the District Collector had given the opinion that there are no STs and OTFDs in the project area). ***To the best of our knowledge these palli sabha resolutions have not been sent by the state government to the MoEF, which is tantamount to deliberate withholding of relevant information/documents.*** Only the palli sabha resolutions setting up FRCs in March 2008, have been sent to MoEF (which MoEF has asked the state government to translate, in April 2010).¹⁸

The Meena Gupta Majority Report also states that not only OTFDs, but also 21 adults belonging to Scheduled Tribes reside in the project area and the process procedures to obtain their consent were not implemented properly due to non-cooperation and negligence on the part of the State

Government of Orissa. The majority members concluded the final forest clearance should be revoked due to illegalities and that the Odisha State Government "...must initiate implementation of the FRA process afresh in the project area in a transparent and democratic way and ensure settling of individual and community rights as per the provisions of the Forest Right Act and Rules made therein".¹⁹

However, the Minister of Environment and Forests did not cancel the permission for forest land diversion, but rather requested the Odisha State Government "provide a categorical assurance" that it did not violate FRA in requesting the permission for the diversion of 1,253 hectares. The Minister's request came as surprise given the fact that from the very beginning it had been the position of the Odisha State Government that no Scheduled Tribes or OTFDs resided in the proposed project area.

In November 2010, the MoEF's Forest Advisory Committee recommended "temporary withdrawal" of the forest clearance on grounds of violation of the FRA. However, ignoring the findings and recommendations of all three committees, the Odisha State Government issued final clearance (meaning the FRA had been properly implemented) in January 2011. In response two Public Interest Litigation petitions were filed with the Orissa High Court.

On 9 September 2011 the Orissa High Court refused to pass an interim stay with regard to acquisition of forest land by the Odisha State Government. However it stayed the acquisition of private land. In other words, the status quo with regard to the State Government's acquisition of private land for the project was maintained.

As per media reports, in July 2012, the Odisha State Government "has decided against acquiring about 438 acres of private land for the 12-[MTPA] steel plant proposed to be set up by [POSCO] near Paradip".²⁰

However, the Odisha State Government's decision to no longer acquire private land does not resolve the FRA issue. Despite the findings of the Saxena and Meena Gupta Committees, the Odisha State Government still has not acknowledged the existence of Scheduled Tribes or OTFDs in the area, and therefore has not complied with the statutory rights of these groups under the FRA. The original writ petition regarding the Odisha State Governments' failure to implement the FRA is pending.

BREACHES TO THE GUIDELINES

1. Failure to seek to prevent or mitigate adverse impacts directly linked to their operations and exercise their leverage to protect human rights

For the past seven years, efforts by the Odisha State Government to acquire land for POSCO's project have been opposed by local communities. Their opposition, expressed through peaceful demonstrations, has been met with violence and acts of intimidation. While not an exhaustive list of incidents, examples of state-sponsored human rights abuses include the following:

- On 26 September 2011, about 400 armed personnel entered Govindpur village where the POSCO Pratirodh Sangram Samiti, (PPSS - Committee for resistance against POSCO) campaign is

located in order to build a coastal road along the beach from the Indian Oil Refinery complex to the port for POSCO. The armed personnel attacked the villagers with rod, sticks and hand-bombs. The police took no action during this incident. More than 30 villagers, including 6 women, were injured. Two villagers remain in critical condition. The injured could not seek treatment at the nearest hospital, because they feared arrest as the police have registered false cases against some them.

- Following a July 2011 visit, the National Commission for Protection of Child Rights recommended the Odisha State Government withdraw its police presence at schools and made an appeal to ensure children's right to education and well-being are protected. (Appendix D)
- On 2 June 2010, protesters were attacked by the police who charged and fired on them during a demonstration opposing a "socioeconomic survey" in the Village of Nuagaon, because they feared the survey was a precursor to land acquisition. Ten people were injured and two protesters were arrested. One of the arrested, Ajaya Swain, was beaten and tortured in the police station.
- On 15 May 2010, Odisha state police brutally attacked local people who were guarding an entrance point to the proposed project site by using tear gas, rubber bullets and police clubs. Several family residences were burned and over 100 local people were injured as a result.
- On 20 June 2008, a group of people at Govindpur were attacked with bombs. Tapan (Dula) Mandal was killed on the spot and several others injured. POSCO did not condemn the death of Dula Mandal.
- On 29 November 2007, the protest dharna (peaceful protest) at Balitutha was attacked by approximately 500 goondas armed with bombs, swords and other deadly weapons. Eight people were badly injured, around 50 sustained lesser injuries, more than 50 motorcycles were damaged and the dharna tent was burned. The police, who were stationed half a kilometre away, stood by during the attack. After the dharna participants fled, the police used the opportunity to move into Balitutha, Gadkujang and Nuagaon, from which they had been previously barred from entering by the people's protests.
- On 27 November 2007, 55 people walking to a protest dharna at Balitutha were attacked by a larger group with sickles and other weapons. Six people were seriously injured, four of whom were hospitalised.
- To date, the Odisha State Government has registered more than 200 criminal cases against the villagers and issued 1,500 warrants, 340 of which are women. Two individuals, who are undertrial prisoners, remain incarcerated.
- Using the threat of arrest, the police continue to impose a de facto blockade on the area and particularly on the residents of Dhinkia Gram Panchayat. Anyone who leaves, including those in need of medical treatment or those who go to the market, is at risk of arrest. Schools in the area are repeatedly closed and used as police camps. The people have suffered repeated and prolonged hardship as a result.

- Abhay Sahoo, a reputed human rights defender and Chairperson of the PPSS has been targeted by the Odisha State Government in order to suppress opposition to the project. More than 55 false cases have been brought against him, including the following:
 - Mr. Sahoo was arrested in October 2008 when he left Dinkia village for ongoing medical treatment. Mr. Sahoo is an acute diabetic and has high blood pressure. Only after Mr. Sahoo’s health further declined did the authorities move him to a hospital on 3 December 2008. While he was in hospital, the police’s inhumane treatment included requiring him to be on the floor and handcuffed in chains.
 - Mr. Sahoo was again implicated in another false case leading to his incarceration from 25 November 2011 to 14 March 2012. (For more information, please see Appendix E, People’s Union for Civil Liberties’ press release concerning the arrest and treatment of Mr. Sahoo. Also see Appendix F, “Attack on people of Dinkia, Gadakunjanga & Nuagaon (anti-POSCO campaigners) by goons, supposedly hired by POSCO contractors on 26th Sep 2011”.)

In a written response to the Business & Human Rights Resource Centre, POSCO stated:

As per Indian Constitution, law and order is a State subject. It is the prerogative of administration to use police based on threat perception. Private companies like POSCO would have no role in this. But as far as we know, there has been no use of force by Govt anywhere during land acquisition process. On the contrary, PPSS has been using violent means to terrorise people into submission and some of those daring to oppose have been exterminated. Any inference on intimidation is without any basis. (Appendix G)

The above response demonstrates POSCO denies any correlation between state-sponsored human rights abuses and the land acquisition process. Consequently, POSCO has not sought to use its leverage to affect change in abusive state practices to acquire land that, should its project proceed, will ultimately benefit the company.

While most of the incidents cited above took place prior to the 2011 revision of the Guidelines, we are calling attention to the fact that POSCO’s denials and continued silence with respect to human rights abuses during the land acquisition process represent a breach to the following human rights-related sections in the Guidelines:

Failure to respect human rights

- Human Rights Chapter IV, Paragraph 1: Enterprises should respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

Relevant Commentary: The chapeau and the first paragraph recognise that States have the duty to protect human rights, and that enterprises, regardless of their size, sector, operational context, ownership and structure, should respect human rights wherever they operate. Respect for human rights is the global standard of expected conduct for enterprises independently of States' abilities and/or willingness to fulfil their human rights obligations, and does not diminish those obligations.²¹

A State's failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights. In countries where domestic laws and regulations conflict with internationally recognised human rights, enterprises should seek ways to honour them to the fullest extent which does not place them in violation of domestic law, consistent with paragraph 2 of the Chapter on Concepts and Principles.²²

Enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights. In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all rights should be the subject of periodic review. Depending on circumstances, enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; persons belonging to national or ethnic, religious and linguistic minorities; women; children; persons with disabilities; and migrant workers and their families...²³

Failure to use leverage to affect a changes in state practices that violate human rights

- Human Rights Chapter IV, Paragraph 2: Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.

Relevant Commentary: Paragraph 2 recommends that enterprises avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur. 'Activities' can include both actions and omissions. Where an enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. Where an enterprise contributes or may contribute to such an impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the practices of an entity that cause adverse human rights impacts.²⁴

2. Failure to conduct comprehensive human rights due diligence, including consulting with and preventing harm to affected communities

POSCO has not carried out comprehensive human rights due diligence (in violation of General Policies Chapter II, Paragraph A.10 and Human Rights Chapter IV, Paragraph 5). This clear breach of the Guidelines includes the company's failure to engage in meaningful consultation with all affected stakeholders (in violation of General Policies Chapter II, Paragraph A.14) in order to identify the full scope and severity of potential human rights impacts (in violation of General Policies Chapter II, Paragraph A.14 and Human Rights Chapter IV, Paragraph 2). Indeed, we cannot find any evidence of sincere efforts to listen and reflect the opinions of affected communities at any stage of the project planning process.

Rather than conducting appropriate and thorough human rights due diligence, it is our understanding POSCO is proceeding on the basis of a socio-economic survey report conducted by Xavier Institute of Management Bhubaneswar (XIMB) that greatly under-estimates the number of people who will have their livelihoods and human rights severely impacted. This includes persons who have special protections as members of Scheduled Tribes or OTFDs under the FRA, which the Odisha State Government has denied their existence (Please see "Background: Land acquisition and Scheduled Tribes or Other Traditional Forest Dwellers" above).

Given the presence of Scheduled Tribes, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO 169 are of particular relevance and should therefore be respected by POSCO. In this regard, we would like to draw the attention to statements from other NCPs, such as the Norwegian NCP in the Intex and Cermaq cases and the British in the Vedanta case on how these rights are linked to the OECD Guidelines.

We therefore allege POSCO has breached the following Guidelines:

Failure to conduct comprehensive human rights due diligence

- General Policies Chapter II, Paragraph A.10: Enterprises should carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.

Relevant Commentary: Due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems. Due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself, to include the risks of adverse impacts related to matters covered by the Guidelines...²⁵

- Human Rights Chapter IV, Paragraph 5: Enterprises should carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.

Relevant Commentary: Paragraph 5 recommends that enterprises carry out human rights

due diligence. The process entails assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed. Human rights due diligence can be included within broader enterprise risk management systems provided that it goes beyond simply identifying and managing material risks to the enterprise itself to include the risks to rights-holders. It is an on-going exercise, recognising that human rights risks may change over time as the enterprise's operations and operating context evolve...²⁶

Failure to engage in meaningful consultation with all affected stakeholders

- General Policies Chapter II, Paragraph A.14: Enterprises should engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects and other activities that may significantly impact local communities.

Relevant Commentary: Stakeholder engagement involves interactive processes of engagement with relevant stakeholders, through, for example, meetings, hearings, or consultation proceedings. Effective stakeholder engagement is characterized by two-way communication and depends on the good faith of the participants on both sides. This engagement can be particularly helpful in the planning and decision-making of projects or other activities involving, for example, the intensive use of land or water, which could significantly affect local communities.²⁷

Failure to identify the full scope and severity of potential human rights impacts

- General Policies Chapter II, Paragraphs A.11: Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.
- Human Rights Chapter IV, Paragraph 2: Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.

Relevant Commentary: Paragraph 2 recommends that enterprises avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur. 'Activities' can include both actions and omissions. Where an enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. Where an enterprise contributes or may contribute to such an impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the practices of an entity that cause adverse human rights impacts.²⁸

3. Failure to carry out environmental due diligence, including consulting with and informing affected communities

POSCO has not completed comprehensive environmental due diligence that assesses all project components and their impacts (in violation of General Policies Chapter, Paragraph A. 10 and Environment Chapter VI, Paragraph 3). In addition, POSCO has not engaged with all relevant stakeholders during the environmental assessment process (in violation of General Policies

Chapter II, Paragraph A.14) thereby rendering the company's existing environmental studies incomplete and inadequate. Consequently, POSCO will be incapable of preventing or mitigating significant adverse impacts on thousands of people and the environment should its proposed project proceed (in violation of General Policies Chapter, Paragraph A.11). Furthermore, POSCO has not provided the public with adequate, measurable and verifiable information about potential environmental impacts of its proposed project (in violation of Environment Chapter VI, Paragraph 2a).

As noted earlier, POSCO intends to build and operate a 12 MTPA integrated steelworks plant, which will include a captive power plant and a captive minor port. POSCO only completed Rapid EIA for Phase I of the steelworks plant and captive minor port (evaluating the impacts at the 4 MTPA capacities) even though these components are planned for 12 MTPA capacity.

The Environment Protection Act 1986, the main legislation governing EIAs, requires the completion of a comprehensive EIA based on data collected for one year. A Rapid EIA is based on data collected for one season, and shows whether a Comprehensive EIA is necessary.²⁹ The Rapid EIA for the steel plant was based on data collected for only for two (2) months (not an entire season). The Rapid EIA for the captive minor port was based on the data collected from September to November, which is the monsoon period, during which time (according to the Environment (Protection) Act 1986) conducting an EIA is prohibited.

The Rapid EIA did not include the planned township, transportation or other related infrastructure. It also did not examine a number of other critically important environmental issues, including the planned water diversion from the Jobra Barrage of Mahanadi River³⁰; impacts to water resources and marine fisheries during construction; the plant's water usage once operational and how this might affect water availability or usability in the region; coastal erosion and pollution to ecologically sensitive estuary and coastal sand dunes; and impacts to Paradip Port, which is already a heavily polluted area.

The Meena Gupta Majority Report concluded:

The Committee strongly feels that there have been many serious lapses and illegalities in the EIA process. The EIA for such a megaproject is rapid, based on one-season data without taking into account all the components of the project like the township project, water project, railroad and transport facilities etc. Moreover it is limited only to Phase I of the project. There are serious violations in the public hearing process where many communities have been left out. The imposition of additional conditions to the existing [environmental clearances] will not at all remedy the lapses and illegalities. The Committee therefore strongly recommends that the Environmental Clearance given by the MoEF dated 15.5.2007 for minor port and 19.7.2007 for the steel plant should be immediately revoked.³¹

Moreover, POSCO's one public hearing on 15 April 2007 about its environmental due diligence was entirely inadequate. In this regard, the Meena Gupta Majority Report noted:

The Committee is of the firm view that the Public Hearing held on 15.4.2007 was not in compliance with the rules. The authorities failed to provide copies of the EIA to panchayats; all the project affected persons were not given opportunity to be heard. It was held in Kujanga about 15 km away from the affected villages. During the hearing, many people complained that

because of the prohibitive distance, many villagers could not travel to participate in the Public Hearing. The committee was informed that there was presence of a strong police force at the venue of the public hearing a day prior to the hearing itself. This served as a deterrent to free participation by local villagers, who were opposing the project. Other project affected people like traditional fishing community and farmers were not covered by the public hearing. The social impact of the project was also not discussed. Project proponent has failed to answer all the objections raised during the public hearing. The EAC has failed to apply its mind to the objections raised by various authorities and the public and have also failed to consider the available material on record. The EAC has also failed to record any reasons in respect of accepting or rejecting the objections raised but instead gave clearance. Such mechanical clearance makes a mockery of rule of law and procedural safeguards.³²

In addition, the Meena Gupta Majority Report also found serious issues with clearances given to POSCO for its Coastal Zone Management Plan. The issues raised by the majority members include maps that do not accurately show the demarcation of the Coastal Regulation Zone (CRZ)³³ and are also inconsistent with maps by the Orissa Space Application Centre; a recommendation to establish a coal/ore and slag yard in areas that clearly violate CRZ regulations; plans to disrupt the natural flow of the Jatadharmohan creek that also violates CRZ regulations; and the failure to request clearance for wastewater treatment plans. Despite the above issues, POSCO was granted clearance by the Government. However, the majority Meena Gupta Committee members concluded:

...POSCO-India Pvt. Ltd has not been able to address all the issues relating to [Coastal Regulation Zone] notification. There are a number of serious lapses and violations, including suppression of facts. The environment clearance given by the MoEF vide letter dated 15 May 2007 should therefore be revoked forthwith.³⁴

On 30 March 2012, the National Green Tribunal (NGT) suspended POSCO's final 2011 environmental clearance.³⁵ We refer you to Appendix A, "National Green Tribunal, Appeal No. 8/2011, 30 March 2012 between Prafulla Samantray and Biranchi Samantray [vs.] Union of India, Orissa State Pollution Control Board and M/S POSCO India Pvt. Ltd". In its Order, the NGT noted:

...A project of this magnitude particularly in partnership with a foreign country has been dealt with casually, without there being any comprehensive scientific data regarding the possible environmental impacts. No meticulous scientific study was made on each and every aspect of the matter leaving lingering and threatening environmental and ecological doubts unanswered...³⁶

The NGT's Order examined the question of whether POSCO should have completed a comprehensive and integrated EIA report of various project components:

7.1 Need for Comprehensive and integrated EIA report of various project components. The majority members of the Review Committee have pointed out that for a project of this magnitude, a Comprehensive and integrated EIA report was required based on at least one full year base line data at the time of conduct of PH and subsequent appraisal by the EACs and the same argument has been put forward by the appellant. Whereas, the Respondents have submitted that at relevant point of time and as per the procedure, Comprehensive and integrated EIA report was not mandatory, it was only that as a part of own responsibility that

Respondent No. 3 prepared a Comprehensive and integrated EIA report engaging agencies of repute at a later date. The issue of integrated EIA report for various components of the project raised by the Review Committee and the appellants needs a consideration. Of course, as per the provisions, the proponent was required to approach different EACs for steel plant and captive minor port and accordingly, separate rapid EIAs were furnished. The available records also indicate that respective EACs were well aware of the other component. We have gone through the various provisions in the EIA requirement procedure and the material placed on record, undoubtedly, at the time of [Public Hearing] and subsequent appraisal by the [Environmental Advisory Committees], Comprehensive and integrated EIA report was not warranted, however, it would have been prudent to have this report at the very beginning stage itself to avoid all the confusion and delays especially considering the magnitude of the project and its likely impact on various environmental attributes in the ecologically sensitive area. In this direction, it would be prudent to note that a similar observation has also been made by Ms. Meena Gupta in her review report. Similar apprehensions have also been raised by the majority members of the Review Committee that considering the nature and extent of project, it was necessary to have a comprehensive and integrated EIA rather than rapid fragmented EIA...³⁷

As noted above, The NGT ordered the Ministry of Environment and Forests (MoEF) to carry out a “fresh review” by a newly-formed committee of “subject matter specialists for better appreciation of environmental issues”. POSCO, for its part, “shall be asked to furnish relevant details required for the said review by the newly constituted committee to recommend specific conditions to be attached/revised in the [environmental clearances] granted by MOEF”.³⁸ (Appendix A)

While the NGT determined POSCO met its minimum legal obligations with respect to the EIA process, the NGT’s Order affirms the fact POSCO has not conducted the level of environmental due diligence needed for a project of its magnitude and anticipated environmental impacts. In this regard, we contend POSCO has also failed to “honour” the Guidelines to the fullest extent possible by failing to complete comprehensive due diligence that assesses all of the project’s components.

It is also important to reiterate that POSCO has not provided the public with adequate, measurable and verifiable information about potential environmental impacts; nor has it engaged in meaningful consultation with affected communities. POSCO’s inadequate and substandard environmental due diligence demonstrates it not only lacks the necessary competency to prevent or minimize environmental damage should its project proceed, but also demonstrates a lack of good faith on the part of the company in dealing with affected people who will be impacted by its project. We therefore allege POSCO is in violation of the following Guidelines:

Failure to conduct comprehensive environmental due diligence

- General Policies Chapter II, Paragraphs A.10. Enterprises should carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.

Relevant Commentary: For the purposes of the Guidelines, due diligence is understood as

the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems. Due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself, to include the risks of adverse impacts related to matters covered by the Guidelines. Potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation...³⁹

- Environment Chapter VI, Paragraph 3: Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.

Failure to engage with all relevant stakeholders during the environmental assessment process

- General Policies Chapter II, Paragraph A.14: Enterprises should engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects and other activities that may significantly impact local communities.

Relevant Commentary: Stakeholder engagement involves interactive processes of engagement with relevant stakeholders, through, for example, meetings, hearings, or consultation proceedings. Effective stakeholder engagement is characterized by two-way communication and depends on the good faith of the participants on both sides. This engagement can be particularly helpful in the planning and decision-making of projects or other activities involving, for example, the intensive use of land or water, which could significantly affect local communities.⁴⁰

Failure to identify the full scope and severity of potential environmental impacts

- General Policies Chapter II, Paragraphs A.11: Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.

Failure to provide the public with adequate, measurable and verifiable information about potential environmental impact

- Environment Chapter VI, Paragraph 2a: Enterprises should... provide the public and workers with adequate, measurable and verifiable (where applicable) and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance.

OTHER PROCEEDINGS

The issues raised in this Specific Instance primarily relate to POSCO’s failure to carry out comprehensive human rights and environmental due diligence, including meaningful consultation

with all affected communities to identify the full scope and severity of potential human rights and environmental impacts. Therefore, none of the following proceedings should prevent or delay consideration of this Specific Instance, as further explained below.

- Orissa High Court regarding the Forest Rights Act 2006 – As noted above, the original petition regarding the Odisha State Governments’ failure to implement the FRA is pending. Nevertheless POSCO has a responsibility to conduct comprehensive human rights due diligence in accordance with the Guidelines and the UN’s “Protect, Respect and Remedy” framework prior to commencing its project.
- National Green Tribunal proceedings - As noted above, on 30 March 2012, the National Green Tribunal (NGT) suspended POSCO’s final 2011 environmental clearance.⁴¹ The NGT’s Order affirms the fact POSCO has not conducted the level of environmental due diligence needed for a project of its magnitude and environmental impacts. The NGT proceedings have concluded.
- Orissa High Court regarding tree felling - A writ petition has been filed at the Orissa High Court by local community members in response to tree felling carried out by the State Government on POSCO’s behalf in September 2011 even though a valid Memorandum of Understanding did not exist between the parties. According to the petitioners, approximately 50,000 trees have been cut down in proposed steel plant area. Another 300,000 Jhaun, Casuarina and Tamarisk trees that protect the coast from wind and sea waves are slated for removal. The petitioners have argued that loss of trees will impact the ecological balance and make communities significantly more vulnerable to devastating cyclones, which are recurrent in the region. The petitioners noted that in 1999 when a super cyclone struck, there were no casualties in the villages protected by the trees. While these proceedings are not directly relevant to the allegations contained within this Specific Instance in so far as the Odisha State Government is the responsible party, the environmental implications of deforestation and increased cyclone risk to local communities should be addressed in POSCO’s environmental due diligence.
- National Human Rights Commission⁴² - The Commission has made inquiries into some of the acts of repression and violence against community members. In addition, the Commission held a hearing on the problems faced by the Scheduled Castes in April 2012. The NHRC is not currently pursuing civil action at this time, but rather the Commission is monitoring developments related to POSCO project. In addition, the Commission has limited authority to make recommendations to companies and therefore cannot recommend or instruct POSCO to conduct human rights due diligence. We refer you to Appendix H, “NHRC team meets villagers at Posco site”.
- Supreme Court regarding mining concession rights - The Odisha State Government leased the Khandhar mines located 500 km from the proposed plant site in the Sundargarh District to POSCO. However, the Odisha High Court has cancelled the lease while a petition filed by Geo-min Minerals, a mining company that had also applied for lease, is pending. The Odisha State Government has appealed the lease cancellation to the Supreme Court. The nature of this legal action – namely whether POSCO will have rights to the Khandhar mines – is beyond the scope of this Specific Instance.

COMPLAINANTS' REQUESTS OF NCPS

We request the Korean, Dutch and Norwegian NCPs to facilitate mediation between all parties to this Specific Instance to address POSCO's breaches to the General Policies, Disclosure, Human Rights and Environment Chapters of the Guidelines. We request all three NCPs to cooperate to the fullest extent possible, and ensure a consistent handling of this Specific Instance in the interest of functional equivalence.

As institutional investors, ABP/APG and GPFG should, consistent with their stated policy commitments to corporate social responsibility, urge POSCO to address the breaches cited in this complaint. Specifically, we request ABP/APG, and GPFG to elaborate on the steps they will take to prevent, through their investments in POSCO, contributing to adverse impacts, to ensure compliance with the Guidelines and their own ESG criteria.

The Guidelines state:

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.⁴³

The Guidelines furthermore state:

Appropriate responses with regard to the business relationship may include continuation of the relationship with a supplier - or business relationship - throughout the course of risk mitigation efforts; temporary suspension of the relationship while pursuing ongoing risk mitigation; or, as a last resort, disengagement with the supplier either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact.⁴⁴

First and foremost, ABP/APG and GPFG should engage in a dialogue with the affected communities and their representatives. We request ABP/APG and GPFG to develop, in consultation with the complainants, a clear and credible mitigation strategy that includes:

- 1) steps to exercise their leverage;
- 2) if necessary, steps to increase their leverage; and
- 3) the public disclosure of minimum criteria for the continuation of the investment

In addition, given the magnitude of the potential adverse impacts and the many years of controversy between POSCO and affected communities, we ask the NCPs carry out or commission an independent fact finding mission that examines all the issues raised in this Specific Instance prior to convening discussions. The NCPs should also be aware of the fact that there is intense local opposition to the POSCO project, so we request all options, including the cancelation, relocation and significant down-sizing of the project, be discussed during mediation.

If mediation fails, we request the NCPs to jointly make an assessment of the facts and circumstances in a final statement, including whether the allegations contained herein constitute breaches of the Guidelines. In order to comply with the Guidelines, we believe POSCO should:

- 1) Obtain the free, prior and informed consent from all members of Scheduled Tribes and OTFDs in accordance with the FRA as a central component of comprehensive human rights and environmental due diligence processes.
- 2) Demonstrate compliance to statutory rights by asking the Odisha State Government to ensure informed consent of the gram sabhas (village counsels) are obtained in accordance with the FRA.
- 3) Make a good faith demonstration of its intentions to ensure that the FRA is implemented, both in letter and spirit, by publicly requesting that the State Government of Orissa halt evictions and deforestation.
- 4) Conduct comprehensive human rights due diligence in a manner that is consistent with the United Nation's "Protect, Respect, Remedy" Framework on business and human rights. The human rights assessment should include meaningful consultation with all affected communities in order to identify the full scope and severity of potential human rights impacts.
- 5) Complete a new Comprehensive EIA that takes into consideration the findings of the report by majority members of the MoEF committee headed by Meena Gupta, the concerns and issues raised by the local people at the public hearing on 15 April 2007 and the National Green Tribunal's March 2012 ruling. The EIA should be based on data collected over 1-year consistent with the Environment (Protection) Act 1986 requirements.
- 6) Engage in meaningful stakeholder consultation with all affected communities to identify the full scope and severity of potential human rights, social and environmental impacts.
- 7) Provide specific and detailed information on the conditions attached to the clearances for the steel plant and port granted by the Indian government and the status of implementation of such conditions.
- 8) Adopt and publish a policy commitment affirming POSCO is committed to operating in accordance with international human rights best practices as reflected in the UN's "Protect, Respect and Remedy Framework" and the OECD Guidelines for Multinational Enterprises.
- 9) Issue a public statement that states POSCO opposes and condemns the use of force or repression under any circumstances.

We look forward to a written confirmation of receipt of this complaint, and appreciate your assistance and leadership in resolving the issues raised herein.

Please send all correspondence to Prafulla Samantara at psamantara@rediffmail.com.

Sincerely,

Prafulla Samantara
Lok Shakti Abhiyan

LIST OF APPENDICES

Appendix A

“National Green Tribunal, Appeal No. 8/2011, 30 March 2012 between Prafulla Samantray and Biranchi Samantray [vs.] Union of India, Orissa State Pollution Control Board and M/S POSCO India Pvt. Ltd”.

Appendix B (“Saxena Committee Report”)

“MoEF/MoTA Committee on Forest Rights Act: Report of visit to Jagatsinghpur (site of proposed POSCO project), Orissa, 23-24 July 2010”.

Appendix C (“Meena Gupta Report”)

“Summary Report of the Committee Constituted to Investigate into the proposal submitted by POSCO India Pvt. Limited for establishment of an Integrated Steel Plant and Captive Port in Jagatsinghpur District, Orissa, October 18, 2010”. To download the full report (261 pages): <http://moef.nic.in/downloads/public-information/report-committee-posco.pdf>

Appendix D

“National Commission for Protection of Child Rights, Report following visit to Jagatsinghpur District, Odisha, 3-5 July 2011 to assess the safety and security of children in the POSCO area, 22 Jul 2011”.

Appendix E

People’s Union for Civil Liberties’ press release concerning the arrest and treatment of Mr. Sahoo

Appendix F

“Attack on people of Dinkia, Gadakunjanga & Nuagaon (anti-POSCO campaigners) by goons, supposedly hired by POSCO contractors on 26th Sep 2011”.

Appendix G

“POSCO’s response to concerns about its proposed steel project in Jagatsinghpur district, Odisha, India”, submitted to the Business & Human Rights Resource Centre, 1 Sep 2011.

Appendix H

“NHRC team meets villagers at Posco site”, [The Times of India](#), 11 Apr 2012.

VIDEOS

“Peoples Resistance to Posco”

<http://www.youtube.com/watch?v=RhcZ2ZmApys&feature=related>

“Anti Posco Leader Illegally Chained to Hospital Bed”

<http://www.youtube.com/watch?v=px3d52vTEuM&feature=relmfu>

“The secret of Dinkia & other villages opposing POSCO steel project”

<http://www.youtube.com/watch?v=sV6dWDhX4Lw&feature=related>

“NO POSCO”

<http://www.youtube.com/watch?v=ar4L2SJRjCA&feature=related>

ACRONYMS

- CRZCoastal Regulation Zone
- EIAenvironmental impact assessment
- FRAForest Rights Act of 2006
- MoEFMinistry of Environment and Forests
- MoTA.....Ministry of Tribal Affairs
- MTPA.....million tons per annum
- NCP.....National Contact Point for the OECD Guidelines for Multinational Enterprises
- NGTNational Green Tribunal
- NHRCNational Human Rights Commission
- OTFDsOther Traditional Forest Dwellers
- PPSS.....Committee for resistance against POSCO
- UNUnited Nations
- XIMB.....Xavier Institute of Labour Management

ENDNOTES

¹ KTNC WATCH is composed of APIL (Advocates for Public Interests Law, apil@apil.or.kr), CFA (Corporate For All, csr@action.or.kr), Energy & Climate Policy Institute (enerzin@naver.com), GONG-GAM Korean Public Interest Lawyers' Group (gonggam@gmail.com), KCTU (Korean Confederation of Trade Unions, inter@kctu.org), KHIS (Korean House for International Solidarity, khis21@hanmail.net), KPLH (Korean Lawyers for Public Interest and Human Rights, hope@hopeandlaw.org), National Association of Professors for Democratic Society (chohiyeon@naver.com), and PSSP (People's Solidarity for Social Progress, pssp@jinbo.net).

² Milieudefensie/FOE-NL, Niza/Action Aid, Transnational Institute, Clean Clothes Campaign, SOMO and Both Ends.

³ "Orissa" is officially spelled "Odisha". Both spellings are used interchangeably in this Specific Instance.

⁴ "CPP means the power plants commissioned by the industries for their self-consumption". (Source: Captive Power Plants: Case Study of Gujarat, India, P. 6: http://iis-db.stanford.edu/pubs/20454/wp22_cpp_5mar04.pdf)

⁵ Similar to a captive power plant, a captive minor port is built and operated by a company for its own purposes.

⁶ Source: <http://posco-india.com/website/project/details.htm>

⁷ "II. Report Submitted By Dr. Urmila Pingle, Dr. Devendra, Pandey, Dr. V. Suresh", Pg. 7, Para. 1.

⁸ Source: <http://posco-india.com/website/project/benefits.htm>

⁹ http://www.orissa.gov.in/stsc/FOREST_RIGHT_ACT/FRA_English.pdf

¹⁰ http://www.indiaenvironmentportal.org.in/files/file/final_order.pdf

¹¹ "NGT Appeal No. 8/2011, 30 March 2012 between Prafulla Samantray and Biranchi Samantray [vs.] Union of India, Orissa State Pollution Control Board and M/S POSCO India Pvt. Ltd", Pgs. 31-32, Paras. 8.1 – 8.9 (8.8 has been omitted).

¹² "POSCO submits revised land plan for 8 MTPA steel plant". Business Standard (India), 5 Jul 2012:

<http://www.business-standard.com/india/news/posco-submits-revised-land-plan-for-8-mtpa-steel-plant/479403/>

¹³ "POSCO submits revised land plan for 8 MTPA steel plant". Business Standard (India), 5 Jul 2012:

<http://www.business-standard.com/india/news/posco-submits-revised-land-plan-for-8-mtpa-steel-plant/479403/>

¹⁴ "Odisha government not to acquire private land for Posco project". The Economic Times (India), 6 Jul 2012:

http://articles.economictimes.indiatimes.com/2012-07-06/news/32566399_1_posco-steel-steel-project-land-for-posco-project

¹⁵ The Indian Express. "MoEF team visits Posco site for green clearance", 22 Aug 2012:

<http://www.indianexpress.com/news/moef-team-visits-posco-site-for-green-clearance/991295/>

¹⁶ Abhishek Shanker, "Posco Said to Get Land for \$12 Billion India Unit in October", Bloomberg Businessweek, 6 Sep 2012: <http://mobile.businessweek.com/news/2012-09-06/posco-said-to-get-land-for-12-billion-india-unit-in-october>

¹⁷ "II. Report Submitted By Dr. Urmila Pingle, Dr. Devendra, Pandey, Dr. V. Suresh", Pg. 8, Para. 5.

¹⁸ "MoEF/MoTA Committee on Forest Rights Act: Report of visit to Jagatsinghpur (site of proposed POSCO project), Orissa, 23-24 July 2010", Pg. 4.

¹⁹ "II. Report Submitted By Dr. Urmila Pingle, Dr. Devendra, Pandey, Dr. V. Suresh", Pg. 10, Paras 15-16.

²⁰ "Odisha government not to acquire private land for Posco project". The Economic Times (India), 6 Jul 2012:

http://articles.economictimes.indiatimes.com/2012-07-06/news/32566399_1_posco-steel-steel-project-land-for-posco-project

²¹ OECD Guidelines for MNEs, Commentary on Human Rights, Pg. 31, Para. 37.

²² OECD Guidelines for MNEs, Commentary on Human Rights, Pg. 32, Para. 38.

²³ OECD Guidelines for MNEs, Commentary on Human Rights, Pg. 32, Para. 40.

²⁴ OECD Guidelines for MNEs, Commentary on Human Rights, Pg. 33, Para. 42.

²⁵ OECD Guidelines for MNEs, Commentary on General Policies, Pg. 23, Para. 14.

²⁶ OECD Guidelines for MNEs, Commentary on Human Rights, Pg. 34, Para. 45.

²⁷ OECD Guidelines for MNEs, Commentary on General Policies, Pg. 25, Para. 25.

²⁸ OECD Guidelines for MNEs, Commentary on Human Rights, Pg. 33, Para. 42.

²⁹ "The difference between Comprehensive EIA and Rapid EIA is in the time-scale of the data supplied. Rapid EIA is for speedier appraisal process. While both types of EIA require inclusion/coverage of all significant environmental impacts and their mitigation, Rapid EIA achieves this through the collection of one season (other than monsoon) data only to reduce the time required. This is acceptable if it does not compromise on the quality of decision-making. The review of Rapid EIA submissions will show whether a comprehensive EIA is warranted or not". (Source: MoEF - <http://envfor.nic.in/divisions/iass/eia/Chapter1.htm>)

³⁰ The Jobra Barrage of Mahanadi River provides drinking and irrigation water to the cities of Cuttack and Bhubaneswar and districts of Cuttack, Jagatsinghpur, Khurda and Kendrapada.

³¹ "II. Report Submitted By Dr. Urmila Pingle, Dr. Devendra, Pandey, Dr. V. Suresh", Pg. 14, Para. 32.

³² "II. Report Submitted By Dr. Urmila Pingle, Dr. Devendra, Pandey, Dr. V. Suresh", Pg. 13-14, Para. 30.

³³ The Coastal Regulation Zone refers to an area designated according to High Tide Lines and Low Tide Lines as provided by the Environment Protection Act 1986. Certain actions such as the establishment or expansion of industrial facilities within the CRZ area are very restricted.

³⁴ "II. Report Submitted By Dr. Urmila Pingle, Dr. Devendra, Pandey, Dr. V. Suresh", Pg. 16, Para. 39.

³⁵ http://www.indiaenvironmentportal.org.in/files/file/final_order.pdf

³⁶ NGT Final Order, Page 22, Section 7.

³⁷ NGT Final Order, Page 23-24, Section 7.1.

³⁸ "NGT Appeal No. 8/2011, 30 March 2012 between Prafulla Samantray and Biranchi Samantray [vs.] Union of India, Orissa State Pollution Control Board and M/S POSCO India Pvt. Ltd", Pgs. 31-32, Paras. 8.1 – 8.9 (8.8 has been omitted).

³⁹ OECD Guidelines for MNEs, Commentary on General Policies, Pg. 23, Para. 14.

⁴⁰ OECD Guidelines for MNEs, Commentary on General Policies, p. 25, Para. 25.

⁴¹ http://www.indiaenvironmentportal.org.in/files/file/final_order.pdf

⁴² The NHRC has broad powers to investigate alleged incidents of human rights abuse, including taking civil action in courts. The NHRC also often undertakes field investigations. We refer you to the NHRC's Frequently Asked Questions portion of its website for further information about the Commission's activities: <http://nhrc.nic.in/>

⁴³ OECD Guidelines for MNEs, Commentary on General Policies, Pg. 24, Para. 19.

⁴⁴ OECD Guidelines for MNEs, Commentary, on General Policies, Pg. 25, Para. 22.