

Cividep-India

Workers' Rights and Corporate Accountability

A Manual on Corporate Accountability in India

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Cividep-India

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List of Abbreviations

CA	Companies Act 1956
CLB	Company Law Board
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
CWP	Civil Writ Petition
DPR	Detailed Project Report
EAC	Expert Advisory Committee
EIA	Environment Impact Assessment
FEMA	Foreign Exchange Management Act 1999
FIR	First Information Report
FRA	Forest Rights Act 2006
FDI	Foreign Direct Investment
HPLRA	Himachal Pradesh Land Reform Act
HSV	Himalayan Ski Village
IA	Implementation Agreement
JJVS	Jan Jagran Evam Vikas Samiti
MCA	Ministry of Corporate Affairs
MNC	Multi-National Corporation
MoEF	Ministry of Environment and Forests
MoU	Memorandum of Understanding
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
PIL	Public Interest Litigation
POSCO	Pohang Iron and Steel Company Ltd
PPSS	POSCO Pratirodh Sangram Samiti (Anti-POSCO Peoples Movement)
RBI	Reserve Bank of India
SEBI	Securities and Exchange Board of India Act 1992
SEZ	Special Economic Zone

Introduction

The purpose of this manual on Corporate Accountability in India is foremost to give an overview of case studies of different organisations such as CSOs, NGOs and Peoples (Mass) Movements that are active in campaigning against corporate-related human rights abuses by MNCs. The manual attempts to capture their particular strategies and campaigning methods whilst also highlighting their successes and failures.

The first part of the manual provides an introduction to Business and Human rights related regulations in India, looking at directors duties as well as reporting requirements for companies under Indian company law. It also presents CSR initiatives by the Indian government.

All in all, companies can be held accountable for certain labour and environmental rights violations although there are no reporting requirements on their social and environmental impacts and no duty on companies to consider the human rights related impacts of their subsidiaries. This demonstrates that the concept of Business and Human Rights is still evolving and effective legal provisions have yet to be implemented within Indian company law.

The second part of the manual comprises of case studies. The first case study is on the resistance of the Anti-POSCO Peoples Movement against the fourth largest steel producer in the world, POSCO and its intention to set up a steel plant as well as a captive port in the state of Orissa. This industrial project is the biggest FDI project in India to date at a cost of US\$12 billion. The case study highlights the projects impacts on human rights and the environment as well as the governments negligence in implementing FRA as well as other important regulations. It also looks at the granting of clearances to the company without proper impact assessments.

Finally, the case study looks at the formation of the Anti-POSCO People Movement as well as its major campaigning strategies. Its successes and failures are portrayed and the relevant findings of the POSCO enquiry committee summarized.

As of January 2012 the struggle of the Anti-POSCO Peoples Movement (PPSS) continues. The POSCO project has not progressed further although the state government of Orissa has acquired government land for the project. Due to the unrelenting resistance of the affected villagers the construction of a coastal road for the planned captive port was brought to a halt. The situation in the affected areas remains critical. Two main leaders of the PPSS have been arrested and villages are virtually sieged by the police. Villagers have no access to local markets or hospitals and are dependent on a network of supporters to bring medicines to their area.

The second case study 'People versus Corporations' by the organisations Him Niti Abhiyan, Jan Jagran Evam Vikas Samiti (JJVM) and EQUATIONS is on a peoples campaign against a tourism project. ABF International came to India in 2005 to invest \$300 million in a Ski Village to be built in Himachal Pradesh. The proposed project would have granted irrevocable rights to use water, power and land by the company and had been approved without due public consultation. Several local NGOs along with EQUATIONS conducted a fact finding mission in 2008 which documented serious flaws and risks of the project. Due to this report that revealed the discontent of local communities towards the project and the lack of an environmental impact assessment the Government of Himachal Pradesh decided to cancel the project.

The third case study by Krishnendu Mukherjee highlights the problem of bringing transnational claims with an example of Indian seafarers working on foreign ships. This case illustrates the the need for effective means to obtain injunctions and compensation against violating companies from abroad operating within India. It also mentions non-legally binding international instruments such as the OECD Guidelines for Multinational Enterprises as a means to hold companies to account.

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It is hoped that more case studies against MNCs from across other sectors and campaigns will follow in future. The aim is to make this a useful guide on campaigning strategies, methods and tools for social activists, NGOs and CSOs.

Contributions from other organisations on their campaigning strategies are welcome and valuable in this regard.

Part I The legal Landscape of Business and Human Rights in India

Business and Human Rights in India

According to a study by the law firm Amarchand Mangaldas (2009) the intersection between business law and human rights in India is still relatively narrow. The following section will summarize the most relevant Acts and regulations passed in India that seek to protect human and environmental rights.

India has a tradition of common law. Corporate law is regulated at a federal (Union) level through the MCA and the CLB. The MCA can investigate companies and penalize companies for any non-compliance of its regulations, the most relevant in this regard is the CA.

SEBI regulates businesses in the security markets and protects investor interests. FEMA and the RBI regulate all FDI in India. In the case of a violation of any of the provisions of FEMA, the RBI can impose a penalty of up to three times the amount of money involved.

Moreover, the Competition Commission of India has the power to penalize companies that enter into anti-competitive agreements.

India has ratified the following international conventions:

- Universal Declaration of Human rights 1948
- International Convention on elimination of all forms of racial discrimination 1965
- International Covenant on Economic, Social and Cultural rights 1966, and

- Convention on the elimination of all forms of discrimination against women 1979

The Indian Constitution grants fundamental rights to all citizens. This includes:

- Equality before law
- Freedom of Speech & Expression
- Right to Life, and
- Freedom to practice Religion

These fundamental rights are enforceable only against the State. Government companies are classified as the State and thus are liable to punishment for violation of any of these fundamental rights.

The following Acts and regulations are also relevant when looking at Business and Human Rights in India:

- Protection of Human Rights Act 1993
- Consumer Protection Act 1986
- Competition Act 2002
- Special Economic Zones Act 2005
- Labour legislation, for example Contract Labour (Regulation and Abolition) Act 1970, Minimum Wages Act 1948, Factories Act 1948, and
- Environmental protection laws, for example Environment (Protection) Act 1986, Forest Rights Act 2006

Incorporation and Listing

In her report 'Business Law and Human Rights in India' for Civil Initiative for Development and Peace (Cividep) the author Alice Gartland (2008) describes an incorporated entity as follows:

“An incorporated company is a distinct legal entity and generally has a persona distinct from its members. Indian law recognizes a number of incorporated organisations including: statutory corporations; trusts (charitable or private); and societies. Incorporated companies can have limited or unlimited liability.”

On incorporation a company acquires its own separate legal personality and can therefore be called to account by legal action. It is distinct from its shareholders and directors by what is referred to as the veil of incorporation. This veil of incorporation can impact upon corporate accountability in a number of ways, particularly because in reality a company's business is carried on by and for the benefit of some individuals. Therefore in certain circumstances it may not be appropriate to simply call into account the company as a separate entity and a court may ignore the corporate character and look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice to the parties concerned, a process known as 'piercing the corporate veil' (Gartland 2008).

The corporate veil can be lifted to hold parent company liable for its subsidiary but only in exceptional circumstances. Courts can lift the corporate veil in cases where the company is a mere sham, commits economic offences or tries to avoid welfare legislation. Moreover, the corporate veil can be pierced to prevent fraud or improper conduct and tax evasion. Finally, courts may pierce the corporate veil to determine whether the personalities of the subsidiary and the holding company are to be recognised as being separated.

Presently in India there are no statutory provisions for companies to respect human rights once incorporated, however companies should be set up for a lawful purpose.

The most common forms of companies are defined in the CA and can be divided into the following types:

a. Company limited by shares (private and public)

Companies limited by shares have their own legal identity. These companies are limited in that the liability of the shareholders to the creditors of the company is limited to the amount of capital remaining unpaid on the shares held by them.

b. Private companies

Private companies must have at least two members, cannot have more than 50 members and must have a minimum paid up capital of Rs.100,000. Private companies cannot offer shares or debentures to the public for subscription.

c. Public companies

Public companies must have at least seven members and must have a minimum paid up capital of Rs.500,000. They can be listed or unlisted.

d. Private companies that are subsidiaries of public companies

A private company that is a subsidiary of a public company is included under the definition of public company under the CA. Certain sections of the CA that only apply to public companies and not to pure private companies also extend to private companies that are subsidiaries of public companies.

e. Foreign companies

A foreign company can be registered in India if it has a branch office or a presence in India. A special disclosure and registration process is required.

f. Listed companies

The CA does not make a distinction between listed and unlisted public companies. Listed companies are public companies that are listed on the stock exchanges in India. The most popular stock exchanges in India are the National Stock Exchange and the Bombay Stock Exchange.

A listed company is required to comply with rules and regulations issued under SEBI as well as the Listing Agreement entered into with the relevant stock exchange(s) where its shares are listed, in addition to compliance with the CA. Eligibility criteria for listing do not include any social or environmental standards.

However, S&P ESG India index exists as a responsible investment index choosing from a pool of the top 500 companies listed on the National Stock Exchange.

Directors' Duties

Under the CA a director has a “fiduciary duty towards the company and must act in bona fide manner for its benefit.” These fiduciary duties include:

- To act in good faith and in the best interests of the company
- To exercise their powers for a proper purpose i.e. to act in a way that does not prevent the majority of shareholders from exercising their rights
- To avoid conflicts of interest i.e. the director must not put themselves in a position where there is an actual or potential conflict between their personal interest and those of the company, and
- To not make secret profit, i.e. they cannot use their position to make personal profit from the opportunities their professional position may present.

The legal consequences for failing to fulfill any of these duties include the possibility of filing a complaint with the CLB for oppression or mismanagement. Directors can also be held liable for breach of trust and criminal breach of trust under the Indian Penal Code.

However, Indian courts can relieve directors from their liability under the CA where they have “acted honestly and reasonably despite having been found guilty of negligence/breach of duty/trust” (Amarchand Mangaldas 2009).

Directors not only owe a duty to their company but are also liable to shareholders and may face unlimited pecuniary liability and imprisonment if they defraud creditors. However, there is:

- No general duty of directors to their employees
- No specific duty to avoid legal risks and damage to the company's reputation
- No duty to consider non-business related impact (to non-shareholders), and
- No duty towards subsidiaries, partners whether in or outside of India: "A director of a parent company is not required to consider human rights related impacts of its subsidiaries unless these would be relevant to the best interest of the parent company" (Amarchand Mangaldas 2009)

Only environmental and labour legislation impose obligations to consider the impacts to non-shareholders. The Environment (Protection) Act 1986 makes failure to comply with provision a punishable offence and directors liable. According to Amarchand Mangaldas 2009: "Breach of any of the provisions of the environmental legislations and labour legislations by companies will result in fine and imprisonment being imposed on its officers who are directly in-charge of and responsible for the conduct of the business of the company".

The Public Insurance Liability Act 1991 imposes a no-fault liability on owners of hazardous substances and requires the owner to compensate victims irrespective of any neglect or default on the owners part (Amarchand Mangaldas 2009).

Labour legislation addresses issues such as payment of minimum wage, health and safety, working hours and leave. Some of the above stated Acts impose liability on the person in-charge of the operation of the company. Breach of any of these legislations can result in either a fine or imprisonment. Directors then have to prove that they acted with due diligence.

Reporting

The CA asks for several reporting requirements. Companies are supposed to file annual returns, provide a balance sheet and profit/loss account of every financial year, publish a board report that includes energy conservation measures and reduction of energy consumption. However, the CA does not mandate companies to disclose their social responsibilities or impacts on non-shareholders. The MCA only recommends companies to disclose their CSR initiatives to the public. Furthermore, the CA does not permit non-shareholders to address companies in general meetings. There are also no requirements on institutional investors to consider human rights impacts in their investment decisions, but also no bar for doing so.

Company reports are verified by independent auditors and can be accessed by shareholders. Consequences for failing to report include a Rs.500 fine for each day that the default continues and up to two years imprisonment for misrepresentation (Amarchand Mangaldas 2009). Nowadays more and more Indian companies do publish sustainability reports even though it is not mandatory under company law.

The Environment Impact Assessment (EIA) Regulations 1994 makes it mandatory for every person undertaking a project anywhere in India to submit an application along with an environmental impact assessment report followed by public hearings. However, further amendments made to the EIA regulations have resulted in the dilution of environmental impact assessments laws. For example, it is now left to the discretion of the MoEF to make half-yearly compliance reports available to the public.

Corporate Social Responsibility Initiatives

The MCA set up the Indian Institute of Corporate Affairs (ICA) as a think tank in 2008 and published a set of Corporate Social Responsibility Voluntary Guidelines in 2009.

CSR Guidelines by the Ministry of Corporate Affairs

- Every business entity should formulate a CSR policy and provide a roadmap for CSR initiatives
- Care for all stakeholders including project affected people
- Ethical functioning, transparency and accountability
- Respect workers' rights and welfare
- Respect human rights and avoid complicity in human rights abuses
- Respect the environment
- Lead activities for social and inclusive development (particularly in area of operation targeting disadvantaged sections of society)

The very fact that these guidelines are voluntary means that there is no duty on companies to comply with them. Moreover, the MCA remains rather vague in terms of guidance on the implementation of its guidelines. Companies are advised to "provide an implementation strategy". Under the strategy they:

- may partner with local authorities, business associations and NGOs
- may evolve a system of need assessment and impact assessment while undertaking CSR activities
- should allocate specific amounts in their budget towards CSR initiatives
- should engage in CSR platforms/programmes, and
- should disseminate information on their CSR policy to all stakeholders through their website, annual reports or other communication media

It remains without doubt that these guidelines cannot be used to regulate corporate behaviour or hold companies accountable for human rights abuses.

The Company Bill 2008 which seeks to replace the CA does not acknowledge human rights obligations but asks to set up a Stakeholder Relationship Committee to resolve grievances.

The Voluntary Social Code for Businesses which was devised by the Confederation of Indian Industries requires a written policy statement on CSR and an explicit strategy in the form of an annual work plan mainstreamed with business processes. Furthermore, 134 Indian companies are member of the Global Compact, a global platform for companies, UN agencies, labour and civil society to support fundamental principles in the areas of human rights, labour, environment and anti-corruption.

The Indian government mandates public steel companies to fulfill CSR targets asking them to spend at least 2% of their annual profit on corporate social governance. It is mandatory for insurance companies to distribute policies in rural sectors and social sectors (unorganised, informal sector) for the first five years of operation.

Apart from these initiatives there are currently no laws in India requiring representation of employees or affected communities on company boards and no laws on non-discrimination on the basis of gender, race or ethnicity. The non-discrimination provision found in Article 14 of the Indian Constitution only applies to discrimination by the State but not by private companies.

In summary, the intersection between business law and human rights in India is indeed narrow.

Although under labour and environmental protection laws companies can be held accountable, there are no reporting requirements on their social and environmental impacts and no duty on companies to consider human rights related impacts of their subsidiaries.

How does this gap in regulations affect communities that face human rights threats by corporations? And at the same time how do MNCs address their human rights risks whilst operating in India? The following cases will look into these issues in more detail.

Part II Campaigns against Multinational Corporations in India



Betel vine plantation on proposed POSCO project area

A Case Study on the POSCO project in Orissa – Cividep India

The following case study on the POSCO project in Orissa is based on interviews with the chairman and spokesperson of the Anti-POSCO Peoples Movement as well as other

social activists, journalists and local villagers whose livelihood will be adversely affected due to displacement in the face of the construction of a integrated steel plant and captive port. All data was collected during a visit to the Jagatsinghpur district of Orissa in November 2010.

Additionally, secondary data in the form of reports by the government enquiry committees, POSCO-India and the Anti-POSCO Peoples Movement were evaluated to substantiate and crosscheck the information obtained through interviews. The POSCO project office in Kujang, Orissa was contacted again on the information they had provided. Unfortunately they did not respond to further queries relating to compensation and employment opportunities of displaced communities as well as grievance mechanisms to ensure participation of displaced communities.

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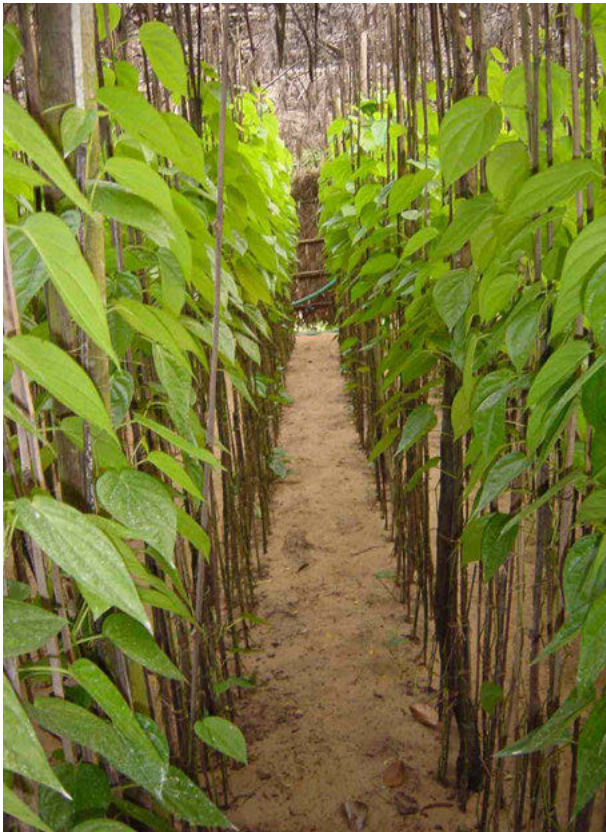
In January 2011 at the time of writing this manual POSCO-India received conditional clearance for its 12 billion ton steel mill from the Ministry of Environment and Forest (MoEF). According to media reports the state government has decided to exclude 284 acres of private land from Dinkia Panchayat which would reduce the number of displaced families from 803 to 613 .

However, POSCO still has to face a case in the Supreme Court of India against its right to mine. Another corporate group Geomin Minerals, a private limited company has taken the state government to court for handing over iron ore mining rights to POSCO in disregard of its prior claim to the ore. It is therefore disputable whether the project will start in the near future since the company cannot produce steel without an iron ore mine.

Background of the company

POSCO was established on 1st of April 1968. It is the fourth largest steel producer in the world with its headquarters based in Pohang, South Korea.

In 2000 POSCO was privatized with a target to produce 50 million tons of crude steel by 2007 as well as expanding its production to other countries such as Vietnam and India. POSCO-India Private Limited is a subsidiary of POSCO and was incorporated on 25th August 2005 with the Registrar of Companies, Orissa, under the CA. It plans to build an integrated steel plant, as well as develop mines and related infrastructure in the Jagatsinghpur district of Orissa (10 km south of Paradip Port). In June 2005, POSCO signed a memorandum of understanding with the State of Orissa. Under the agreement, POSCO plans to invest US\$12 billion (the highest FDI in India to date) to construct a steel plant with four blast furnaces, an electricity plant, a captive port (close to the existing Paradip Port) as well as housing and other related infrastructure. POSCO has been granted Special Economic Zone (SEZ) status for its steel plant and captive port. The expected annual turnover is Rs. 20,580 crores.



Betel vine, Orissa

According to the POSCO a 4 million-ton per annum capacity steel plant was planned to be set up in Orissa, during the first phase of the project by 2011/12, which would later be expanded to the final production volume of 12 million tons of steel per annum.

The company promised to create 18,000 direct and 30,000 indirect employment opportunities in the region. POSCO planned to start production in 2010.

However ongoing opposition to the project by local residents since 2005 have brought the start of operation to a halt. Opposition leaders claim that the project will only benefit the company while displacing more people than it employs, damaging the environment and taking India's mineral resources at a very low price.

Loss of livelihood and proposed compensation

Estimates on the likely number of people who will be affected by displacement varies from 471 families claimed by the company to 4,000 families claimed by the Anti-POSCO movement.

According to the PPSS the proposed plant will affect three gram panchayats (local-governance bodies) – Gadkujang, Nuagaon and Dinkia – which cover 11 villages in total, comprising 4000 families of over 22,000 people in Erasama block of Jagatsinghpur District. Almost one third belongs to the Dalit (Untouchables) community and other backward castes.

In its Resettlement and Rehabilitation (R&R) policy 2006 the Directorate of Resettlement and Rehabilitation, Government of Orissa mentions the following objectives:

- To avoid displacement wherever possible and minimize it exercising available options otherwise
- To recognize voices of displaced communities emphasizing the needs of the indigenous communities and vulnerable sections
- To ensure environmental sustainability through participatory and transparent process, and
- To help in guiding the process of developing institutional mechanism for implementation, monitoring, conflict resolution and grievance redressal

POSCO claims that the compensation it plans to pay will be in full compliance with Orissa's Resettlement and Rehabilitation policy and that it plans to compensate displaced residents as follows:

- Original displaced families losing homestead land and agricultural land will be given employment, cash compensation varying from 1 lakh to 5 lakhs, and a house in a resettlement habitat.
- Families losing all agricultural land will be compensated with the best land value in recent three years and simultaneously would be entitled to jobs and cash compensation.
- Vocational training through training centers in Sandhakuda in Paradip and existing facilities in and around Jagatsinghpur would be utilized for enhancing employability of the affected people for sustainable livelihood.
- One guaranteed job to one eligible member of each displaced family or cash compensation.
- Education support to one member from each displaced family not having any eligible person for a job in the company.

Even though the company plans a compensation strategy in line with Orissa's R&R policy 2006 affected people oppose the project due to many reasons. First, the proposed project area is used as agricultural land, especially for the cultivation of Betel vine (pan leave) as well as forest land which provides the livelihood for tribal communities

and other forest dwellers who are dependent on the forests for fuel, fodder, fruits and medicinal plants. The local residents do not want to leave their homeland on which they have lived with their families for generations. They fear they will lose their livelihood since they would not be compensated with land for the land they will lose but only with cash or industrial employment. According to a new job reservation policy by the Government of Orissa, all industries setting up units in the state of Orissa would have to provide at least 90 per cent jobs in unskilled category to local people including the families affected by project and up to 60 per cent jobs in semi-skilled category. POSCO India was reluctant to accept this requirement claiming that job reservation on geographical basis did not conform to the constitutional provisions of India. There have been a number of additional contentions that have been raised:

- Firstly it is questionable whether Betel vine farmers are suitable to work in or construct a steel plant. There are around 5,000 betelvine farms in this area tended by about 10,000 cultivators which provide an average annual income of Rs.1 lakh per acre each apart from providing wages of about Rs.1 lakh of ancillary employment being generated for a number of daily labourers.
- Secondly, the fishing community, a large community depending entirely on the river and the sea fears that their fishing rights will be affected by the project due to environmental pollution and also the change of the river mouth due to the construction of a captive port.
- Thirdly, to date Orissa's land rights have not been settled in many areas. Government land has been used for cultivation for years. Many families have not registered their land in their name because they lack the knowledge to do so. There are a number of landless farmers who grow betel vine and cashews on Government land. Others depend on basket making, work as daily labourers on the beetelvine farms or are engaged in pisciculture, mostly prawns. These groups will be particularly vulnerable to the loss of land and livelihood opportunities.
- Fourthly, local people are worried about the water consumption of the project which might affect the availability of drinking water in the region. According to the Memorandum of Understanding (MoU),

the Government of Orissa permits draw and use of water (roughly 12 thousand to 15 thousand crore liters) from the Mahanadi barrage at Jobra and Naraj in Cuttack for the proposed POSCO project. Concerns have been raised that this would have adverse effects on the water supply for domestic and irrigation use in the areas of Cuttack city and farm lands of Cuttack, Puri and Jagatsinghpur districts of Orissa.

- Lastly, the issue of industrial waste produced by the steel plant and its disposal worries local residents and has not been properly addressed.

With a history of failed promises of compensation in other industrial projects that were supposed to bring development and prosperity to one of India's poorest states it is obvious that the local community is suspicious of any mega project of the sort that is proposed.

According to journalist and social activist Ravi Das, "people who will be affected by the project cannot be employed outside the agriculture sector. They are deeply rooted in agricultural, fishing and forest activities to earn their livelihood. Even if they are given cash compensation for their land, they cannot start a business because they lack knowledge and skills." He therefore believes that they have to be provided with means to secure their livelihood with the skills they possess.

Opposition to the POSCO project in Orissa

The POSCO Pratirodh Sangram Samiti

The POSCO Pratirodh Sangram Samiti (PPSS) (Anti-POSCO Peoples Movement) describes itself as a democratic mass movement adhering to the principles of peaceful and democratic resistance. It has built up resistance against the POSCO project in Orissa for more than five years by organising mass awareness campaigns as well as a series of demonstrations, rallies and protests. Apart from campaigning efforts and public protests PPSS has also successfully stopped the entry of POSCO, police and government officials to the proposed project area (covering

eight villages). It has even set up check gates with guards at the entry of every village. However, resistance to the project has also resulted in confrontation with police forces and registration of more than 100 cases with police against members of PPSS and some activists even being sent to jail. According to PPSS the police has filed First Information Reports (FIRs) against supporters of the movement and uses these to arrest anti-POSCO villagers who venture out of the area. People cannot leave their villages to receive health care because of the threat of arrests. Until now 158 cases have been registered against villagers by the government, 825 warrants have been issued out of which 340 are against women and six persons are presently imprisoned.

PPSS claims it is not opposed to industrialization for the growth of economy per se but it opposes further industrialization at the cost of the agricultural economy. In contrast to the construction of a 12 million ton steel plant it suggests establishing small-scale agriculture-based industries such as cashew processing plants that would help the local farmers in the region.

PPSS has a widespread solidarity network including solidarity groups in every major Indian city as well as social activists from within and outside of India including Human Rights groups from South Korea and trade unions. It is further supported by individuals from some of the political parties (mainly from the Communist party of India) but is not affiliated to any party as such. PPSS claims that it has thousands of local supporters and that at least 80 per cent of the affected villagers are supporting their movement. The movement is financed by donations mainly from the local community on a donation collection pattern based on the size and number of betelvine plants of farmers (one Rupee per one tree, i.e. one row of betelvine plants) in four to five affected villages.

The major demand of the PPSS is that the government of Orissa withdraws all environmental clearances that have been granted in violation of the FRA. Furthermore, PPSS demands that other CSOs show solidarity against MNC projects that displace people and endanger water, land, livelihood, forest and natural resources.

In its struggle PPSS draws on the experiences and the successes of the Anti-Displacement movement and other specific movements against MNCs such as TATA Industries, Vedanta and ArcelorMittal.

Campaigning methods and strategies - Success and Failures

PPSS opposes the POSCO project which would include the construction of a 12 million ton capacity steel plant and a captive port. Its main concerns are the deforestation of land and related loss of livelihood by local communities.

To pursue its goals it adopted various campaigning and communication strategies.

These involved media campaigning strategies such as writing letters and petitions to the Government, running an online petition entitled 'Scrap POSCO Project' addressed to the Prime Minister of India as well as constructing several websites that provide information about the project and its likely impacts. Moreover there has been on the ground campaigning efforts such as denying access to the area to POSCO as well as government officials and police forces by creating road blocks and checkpoints at the entry of the affected villages. PPSS also prevented the laying of the foundation stone of POSCO's steel plant by the Korean president in 2010.

The movement started with organizing a mass awareness campaign with street meetings in each village to inform villagers about the consequences of a mega-industrial project and understand what is at stake. In order to achieve their goal PPSS needed to gain local peoples' trust and convince them to join and support the movement. This was done through regular interaction with the affected community and dialogue about their concerns and needs.

A seven day march from Dhinkia village to the site of Vedanta University near Puri was organized along with other mass movements in Orissa,

including the Vedanta University movement, the Vedanta Bauxite movement, the Anti-TATA movement, Farmers Movement and the Movement against Nuclear Power Plants.

PPSS follows a strict no-communication strategy with the company however, in one instance, they were willing to engage with the Government. In June 2010 the government of Orissa invited PPSS representatives for a discussion with the Chief Minister of Orissa who assured PPSS representatives that he would visit the proposed project site if they allowed a land survey of the area (in order to count the local population and number of trees, and betel vine plantations). PPSS agreed to facilitate the survey if the Chief Minister paid a visit the project site.

Allowing a land survey to be conducted and negotiating with the Government was seen as a deviation from its actual campaigning strategy and the PPSS was criticized by other activists for doing so. Consequently after the survey was completed the Chief Minister did not come to visit the affected villages. PPSS representatives felt betrayed by the Government for not holding its promise.

PPSS has also made use of the Forest Rights Act 2006 (FRA) which states that people living on forest land for more than 75 years have the right to stay there and cannot be displaced. A temple in one of the villages of the project site has property in its name from the year 1893, a proof of human settlement in this area.

Legal steps against the project have not been taken so far, except for filing a complaint with the National Environment Commission with the help of a petition by the PPSS solidarity network.

One of its campaigning successes is PPSS' support from its broad solidarity network. The PPSS protest has found support around the country with leaders of trade unions and people's movements visiting the protestors. It has also achieved remarkable media coverage for its cause.

PPSS chairman Abhay Sahoo described the most successful campaigning strategy as follows: “Our most successful strategy was breaking the police barricades and removing police camps from our villages on April 1st 2008. To date if the police want to enter our villages they have to seek our permission. From November 2007 till April 1st 2008 the entire project area was barricaded by police forces. The Police were stationed in schools in the villages. People were not allowed to move freely and could not even go to the market - a human rights violation. On April 1st we requested the support of all mass movements to come and save Dinkia village. And people came in thousands from Orissa and also delegations from all over India. In their presence we broke the barricades and removed the police forces. We encouraged people to stand in front of the police peacefully.”

In its struggle against the POSCO project PPSS has however also faced many atrocities especially from police forces using teargas and firing at camps of protesters. During such an incidence in May 2008, 100 people were injured and 15 arrested. Many human rights organizations including Amnesty International have condemned this behavior by the police.

Assessment by the POSCO Enquiry Committee

After conducting a land survey the government of Orissa started to partly acquire land for the POSCO project without implementing the FRA. Upon a letter of protest to the MoEF two enquiry committees were sent to investigate the case. The first, the Saxena Committee, came to the conclusion that the acquisition of forest land is illegal under the FRA. It pointed out that the state was unable to provide village council clearances for using forest land and other documents as required by the Environment Ministry.

A second committee led by Meena Gupta, a former state environment secretary looked into the case in July 2010. Its specific role was to evaluate the implementation of the FRA and rehabilitation and

resettlement provisions. Committee members reviewed documents and clearances that had been given to the company and interviewed different stakeholders.

It should be noted that this committee could not come to a joint conclusion and therefore submitted two separate reports to the MoEF.

The first report by three of the four committee members declared the forest and environment clearances given to POSCO by the Orissa state government as illegal and therefore recommended that hence the clearances should be withdrawn. On the status of implementation of the FRA the first committee report concluded that the final forest clearance should be revoked because there is a forest dwelling community living in the project area whose forest rights have not been implemented under the FRA yet. Thus the acquisition of land is in violation of the regulations imposed by the MoEF.

On the status of Rehabilitation and Resettlement (R&R) Implementation the committee report concludes that the rehabilitation package has to:

- Take into account the loss of sustainable livelihood
- Provide land for land compensation and account for particularly vulnerable sections of the community such as landless labourers and women, and
- Include a rehabilitation strategy for the affected fishing communities who are currently left out of the R&R scheme

It also states that there have been more failures than successes with the implementation of R&R schemes in the past and accordingly displaced people often live in greater destitution than before. If carried out in a rush and without adequate transparency and assistance displacement can be a 'psychologically traumatic event'.

Finally, on the granting of environmental clearances for the steel plant and captive port the committee report states that a comprehensive EIA as mandatory under the Environment Protection Act 1986 was not

carried out properly. The rapid EIA that took place does not capture the full environmental impact and can thus not be used as the basis for granting environmental clearance for a project of such scale. With regard to the captive port it should be noted that its construction might lead to severe erosion along the coastline and an increase of pollution. The above mentioned issues as well as a public hearing process about the project which was not carried out in an appropriate way because it did not cover all affected stakeholders led the committee to conclude that all environmental clearances given by the MoEF should be cancelled.

The contesting report by the fourth committee member Meena Gupta comes to a different conclusion. Although the report agrees that the implementation of the FRA has to be re-done in all affected villages, it considers the R&R scheme in line and even better than the one proposed by the government of Orissa. However, it acknowledges that landless labourers and fisherman have to be included in the scheme and compensated adequately. Only once forest rights are implemented and the affected people compensated for their loss of land, should forest land be diverted for the project purpose. The construction of a captive port and the disruptions it might cause along the coastline including increased pollution of the sea and threat to endangered species, the water consumption of the steel plant from a local water barrage and the scarcity of drinking and irrigation water it might cause have yet to be addressed. Environmental clearance should only be given to the project after a comprehensive EIA. However, the author disagrees with the other committee members on the revocation of clearances that have already been granted for the first phase of the project.

Both committee reports reveal serious flaws and violations of environment laws by the MoEF as well as the government of Orissa. It is appalling that environment clearances have been issued without a comprehensive EIA by the company and an independent third party. Furthermore, the R&R scheme leaves out particularly vulnerable sections of the community whose livelihood will be adversely affected by displacement.

Conclusion: POSCO-India Building better tomorrow with steel?

The company slogan 'Building better tomorrow with steel' leaves a bitter aftertaste knowing that whole village communities will have to be displaced to make room for a development project designated to help poverty-stricken Orissa and create economic growth in one of India's poorest states. It remains unclear how it will help to build a better tomorrow if forests, land, livelihoods and mineral and natural resources of the state are being diverted and explored for steel production. It is also questionable just how sustainable economic growth will be since natural resources are finite and thus once depleted it is unclear what will happen to this once fertile agriculture land.

Communities affected by MNC projects are often the most vulnerable ones without any other livelihood options and a general lack of access to information and effective remedy.

Even while using modern technology called FNEX which operates without blast furnaces, sintering plant and coke ovens the project will have severe social and environmental impacts. The change from agriculture and forest land to industrial land leaves beetle vine farmers and plantation labourers and other forest dwellers without an opportunity to secure their livelihood. It could be argued that people oppose the project simply because they do not want to leave the land on which they have lived for generations. However, they are not even compensated with land of equal value but only with cash and housing in a rehabilitation colony. Depriving people of their livelihood options can be seen as a violation of their rights. Journalists and activists in Orissa are of the opinion that if livelihood options are taken from people they have to be compensated with a means to secure their livelihood and that "these livelihood options have to be according to their choice and not according to the MNC's choice!"

Apart from the social impact one has to look at the environmental impact of the project as well. Several government committee reports have made

it clear that environmental clearances have been given in violation of existing laws. It is alarming that there has been no proper EIA to assess the impacts of the POSCO project on land, coastline, water consumption and industrial waste disposal. The minimum requirement to grant clearance for an industrial project of this scale should be that all laws are implemented and state government institutions that grant permission act in accordance to these laws. Environmental and human rights laws cannot just be broken in the name of development and industrialization.

Peoples Movements such as the PPSS are essential in ensuring that local people get their voices heard. Even with little resources these movements can survive due to an international support network and cause considerable delays or valuable alterations of a project. A legal struggle against POSCO has not been taken up by PPSS so far but might be necessary in light of the recent granting for clearance. Another important legal tool is the FRA which allows affected families to enforce their rights with respects to the land they live on.

A lesson that can be drawn from this case study for other campaigns against MNCs is the importance of grassroots level activism which has the power to prevent or at least delay corporate projects combined with a strong national and international support network that ensures media attention and informs global civil society about potential human rights abuses.

People Vs Corporations

A Case study of a Tourism Project – Him Niti Abhiyan, Jan Jagran Evam Vikas Samiti (JJVM) and EQUATIONS

Alfred Brush Ford's business company ABF International came to India in 2005 with a spate of investments in mega tourism projects. The largest one with an investment of \$300 million was a Ski Village to be built in Kullu District of Himachal Pradesh. The Himalayan Ski Village Limited (HSV), was a company floated for it, in which Alfred Ford maintained the largest share. The Memorandum of Understanding (MoU) for the proposed Himalayan Ski-Village Resort in Kullu District was inked on 9th December 2005 with State Cabinet approval. Local campaigns against the project began in 2006 when Jan Jagran Evam Vikas Samiti (JJVS), a local NGO based in Kullu District, managed to get a copy of the MoU which revealed that the government had heavily short changed public and the state's interest for a property development plan for private profits. Irrevocable rights to use water, power and land is what shocked the residents of the proposed project area. It is also a project that had been approved without due public consultation. A fact-finding was conducted early 2008, which served as an important campaign document.

Introduction

Alfred Brush Ford's business company ABF International came to India in 2005 with a spate of investments in mega tourism projects. 3 of these, worth \$159 million were in West Bengal (Mayapur). The fourth one with an investment of \$300 million was a Ski Village to be built in Kullu district. ABF International floated separate companies for each of these projects. The Himalayan Ski Village Limited (HSV), in which Alfred Ford maintained the largest share, was floated for the Himachal



Rough Map of the Ski Village

mega-tourism project. The Memorandum of Understanding (MoU) for the proposed Himalayan Ski-Village Resort in Kullu District was inked on 9th December 2005, after State Cabinet approval.

Initial news reports indicated that the project would involve construction of 700-plus hotel rooms of four, five and seven star classes, villas and condominiums, shopping complexes, restaurants, luxurious spa facilities apart from skiing and winter sports facilities. “The sheer magnitude of the project was the cause for the initial skepticism”, said Pushpaal Thakur, a resident of the Kullu Valley and a member of Jan Jagran Evam Vikas Samiti (JJVS), a local NGO based in Kullu District. The first alarm bells, however, rang in the State Assembly when the Bharatiya Janata Party (then in the opposition) raised a hue and cry on some of the terms of the MoU. JJVS, through their contacts in Shimla, managed to get hold of the copy of the MoU which revealed that the government had granted various rights to the company for the project which would have serious implications for the local environment and livelihoods.

A glance through some of the clauses of the MoU is enough to reveal that the government had heavily short changed public and the state’s interest for a project that was a property development plan for huge private profits.

Violation of state laws and governance processes

Several clauses in the Project were objectionable and were against the strain of existing land and forest laws as well as governance processes. Some of the clauses which drew the irk of the people were:

a. Assistance to the company for acquiring land

The MoU has outlined various obligations for the government which include ‘assisting’ the project in obtaining subsidies and incentives, obtaining 99 year lease over 5 hectares of government land, acquiring up to 60 hectares of private land at fair market prices and acquiring such other private lands or leased out government lands as may be needed for the project.

b. Exemption from Section 118 of the HP Land Reforms Act (HPLRA)

The HPLRA was passed in 1972 with the prime objective of transferring land to the tillers as well as ensuring distribution of land to tenants and the landless. As a protective mechanism, Section 118 of the Act provided for restriction of buying and selling of land by non-Himachalis in Himachal Pradesh.

However, the MoU stated that the government will *“Allow the company to sell or sublease to any person the commercial residential buildings or sites within the project area for the purpose of the project – The government shall grant exemption from the provision of Section 118 of the HPLRA for sale of up to 300 defined units to Non-Himachalis”*

c. Granting of rights over common property resources

The MoU, provided for the granting of *“irrevocable license to the company for use of ski trails and the making of snow/ice on such trails for the duration of the lease; and for construction of trail markers, retention ponds, underground waterlines and water pumps along the trails and grooming of the trails for skiing”*. The government had committed to provide to *“the Company and its invitees water rights in the project area, including tapping of unused nallas/ground water and for building retention ponds for snow making and supply to resort village.”*

Additionally, the government would be obliged to *“Facilitate and secure free use of the common law right of the legally admitted skiers by the company to pass and repass on the ski trails without impediment and also allow the company and its invitees full access to Public and Private roads and accord permission to build roads, ropeways or gondolas wherever required”*.

d. Unequal access to and denial of right to information

While on one hand the MoU states that it will be the responsibility of the government to *“Provide to the Company within a reasonable time normally not exceeding 15 days, copies of all available documents, data, information relevant to the project”*, on the other it has a clause that makes any information about the project to be let

out in the public domain virtually impossible. The clause that “The parties shall not divulge any trade, technical and commercial secrets or confidential matters of one and another to a third party” can be (and is being) used to deny any information about the project to the local community who are rightfully entitled to receive information regarding the project, especially as its impacts their life and livelihoods.

e. Minimal Obligations for the company

As per the MoU the Company has to invest a minimum of \$135 million within a period of five years from the execution of the Implementation Agreement (IA) and that phase I of the project which shall include skiing and hospitality operations shall be completed within three years from the date of starting the project. The only obligation that attempts to ensure benefits to the local community is one which states that the company should ensure that a minimum of 70% of the total employees shall be residents of Himachal Pradesh. However, the MoU goes on to add a disclaiming clause which states that “Subject to availability and suitability, the unskilled and skilled staff and other non-executive shall be recruited on priority through local employment exchanges and displaced families if any.” The MoU also mentions that 50% of the royalty from all revenue generated by the Ski Village shall go to a trust of the affected Gram Panchayats.

The clearance for diversion of forest land for the project would have to be granted by the Ministry of Environment and Forests (MoEF) at the Centre under the Forest Conservation Act, 1980. In March 2008, the Conservator of Forests at Kullu stated that the matter had not yet reached his office. In addition, as per the provisions of the Environmental Impact Assessment (EIA) Notification, 2006, state governments are authorized to grant environmental clearance for all construction projects through an Expert Committee constituted specifically for this purpose. In the case of Himachal Pradesh, since such a Committee was yet to be constituted, the clearance was pending before the Expert Committee for construction projects at the central government level.

Potential impacts of the Project

a. Environmental Implications

According to the Detailed Project Report (DPR) the developments in the Ski Village would be located at heights between 7,500 and 14,000 ft above sea level on the left bank of the Beas River starting from Palchhaan village beyond Manali town. While the built up area would be spread over 133 acres, the project would require access to 6000 acres of the mountain range for skiing activities.

The abstract of the DPR suggests that approximately 36.75 acres of the land required to be diverted to the project is forest land under the jurisdiction of the Forest Department. Apart from this the rest of the land which will not be diverted but accessed for skiing and other winter sports is all mostly under temperate forests of Cedar, Birch, Fir and Alpine Grassland meadows. Construction activity in these lands, alpine areas and high forested slopes would require large scale deforestation. The deforestation would have a direct impact on the local flora and fauna. This, coupled with accentuated soil erosion would mean less water retention in the hills, increased risk of floods and siltation in agricultural fields and dams downstream. Also, the alpine meadows and temperate forests are home to many a medicinal plant. Wildlife like the Monal pheasant and the Musk deer are still found here. The peak tourist season is also the breeding/nesting season for most of the birds and pheasants. Besides the pollution of air and water that will be caused by the construction, the pollution of water resources in the high altitude areas due to the use of chemicals for stabilizing snow is feared to make water in local sources undrinkable and unusable for agriculture. The added flow of tourist vehicles will also be an additional impact due to pollution and local warming.

b. Livelihood Concerns

The river Beas runs through the Kullu Valley which is inhabited mostly by farming communities (Thakurs) tending apple orchards along the terraced slopes. Some of the chief livelihood concerns faced by the people living in these 60 villages would be:

- Deforestation, Slope destabilization and landslides - Construction activity in the alpine areas and high forested slopes would require large scale deforestation. This area would be more than the area that the Company actually acquires as it is allowed through the MoU to construct trail markers, retention ponds, underground waterlines and water pumps etc. The larger and the long term impact of commercial activity on the slopes would be on the entire ecosystem affecting the flow of natural resource like fodder, fuelwood, grass and medicinal herbs to the villages which are located lower down along the slopes. Soil erosion is the first fallout of any construction on a mountain side. This further leads to problems like flooding, landslides, loss of flora and siltation in agricultural fields which will directly affect the villages.
- Diversion of streams used for drinking water and irrigation - As per the Project Report the Company will tap raw water at 1440 kilo liter per day from the Kothi Beas and Harnola Nalas. The creation of artificial snow (which extends the skiing season beyond natural snowfall periods) will require huge quantities of water and power. While the company has repeatedly stressed that artificial snow will not be made – the MoU states the contrary. These nallas or streams are the main source of drinking and irrigation water in the villages downstream. Villagers fear that the use of chemicals in artificial snow making will pollute the water sources rendering them un-potable. “If water that is used to irrigate the apple orchards and farms is diverted then the local economy would be directly hit”, says Irawati Devi of Katrain Mahila Mandal.
- Access and availability of fuel wood, fodder and timber - Apart from the water, these forests are used for fuel wood, timber, grazing animals, collection of medicinal herbs and fodder by the

local villagers since time immemorial. Their community rights are recorded in a document called the Wajib-ul-arj (a legally recognised instrument by the Forest Department made during the British Settlement time) which specifies the rights of each village to the forests. In order to facilitate the access of the staff and the guests of the company, the access of the local people to the hill slopes in order to exercise these rights will be restricted.

- Access to alpine meadows for grazing and medicinal plants - The alpine meadows are not just used for extraction of medicinal plants by communities, especially some of the Khampas of the Spiti Valley who have settled in the area. Nomadic communities, Gujjars and Gaddis, from 6 districts of the state actually bring their livestock (buffaloes, sheep and goats) to the area for about 6 months of the year for grazing in the high altitude pastures. Their livelihoods run on the sale of milk and meat in the local markets during this time (from April to November –around the onset of winter and snow). Their rights and livelihoods would be completely displaced if the project comes up. The rights of these communities are recognised in the Wajib-ul-arj as well and they are issued permits by the local forest department for the grazing rights in the area. Further, the local Panchayats are also paid royalty for granting grazing rights by the Gujjar communities.

c. Cultural and Spiritual Concerns

Central to the local life and environment are the local cultural traditions of the Kullu Valley, dictated by the local deities or devtas. The traditional temples, made out of local stone and cedar wood, carved beautifully by local artisans, are in forests (on the same slopes where the skiing activity is proposed) where, according to belief, the local deities and spirits reside. These areas are considered as sacred and are the foundations of local social, religious and cultural life.

The Campaign



People in one voice rejecting the project during the Public Hearing, June 2009

Below is the timeline of events related to the project as they unfolded from 2005 to 2008:

- 9th December 2005 – The MoU for the ski village was signed.
- December 2005 – January 2006 – matter raised by the BJP in the State Assembly.
- 10th January 2006 – first meeting on the issue by Jan Jagran Evam Vikas Samiti – a small local group of residents of the area. Under the leadership of Lal Chand Katoch and Pushpaal Singh Thakur decided to take up the issue after the news of the MoU hit the papers. Jan Hit Sangarsh Samiti – local network of 24 NGOs of Kullu District under the leadership of S.R. Verma extended support to the campaign.
- 16th February 2006 - A Jagati Puch or Dev Sansad (literally meaning parliament of gods) was held at Naggar at a local temple and the local deities, through an oracle, rejected the project on the grounds that it will bring doom for the people. They also suggested that the battle should be fought at the judicial level.
- 5th June 2006 - the Implementation Agreement was finalized. As per newspaper reports the company was to submit a Detailed Project Report (DPR) within 6 months of the IA to the State Government.
- June 2006 - 2007 – Local mobilisation against the project. Resolutions by 10 out of 12 Panchayats were passed against the project.
- December 2006 – The project proponents signed a memorandum of understanding (MoU) with FINPRO, Naturpolis, the Kuusamo municipality (Finnish Organisations) to take the Manali resort forward.

- March 2007 – The DPR was submitted to the State Government.
- 5th June 2007 – A year after the Implementation Agreement, the Council of Ministers approved the DPR. As per the Managing Director of the project an EIA report along with the DPR was submitted to the State Government. The EIA report was also submitted to the Central MoEF.
- 6th June 2007 – Public Interest Litigation (PIL) was filed in the High Court by JJVS and made 6 parties to the case (government departments, MoEF and the company). A hotelier called Sanjeev Sharma, from Vashishth Panchayat also filed a PIL in the matter in the same year. The second PIL made 10 parties as respondents to the case including the Ministry of Defence.
- 18th June 2007 – A massive protest rally against the project attended by Sunderlal Bahuguna and other activists.
- 29th December 2007 – The Union Ministry of Environment and Forests Expert Advisory Committee (EAC) on 'New Construction Projects' listed the project for consideration/discussion but the matter was deferred since the required documents were not presented before the committee.
- 11th February 2008 – Newspapers report that Chief Minister Dhumal visited Kullu and stated that the BJP government would 'review the project' since it 'lacked transparency'.
- 23rd February 2008 – JJVS, Him Niti Abhiyan (a state level coalition of people's groups and activists) and EQUATIONS submitted a memorandum to the EAC, MoEF outlining concerns related to the project and demand public consultation and serious assessment.
- 25th February 2008 - The matter was listed for consideration again at the EAC. The project proponents were asked for clarifications as well as court orders related to the project.
- 25th March 2008 – Hearing on the PIL in the High Court at Shimla. Court moved the hearing to 9th April 2008 from 25th March 2008 – The Ministry of Environment and Forests' Expert Committee's Recommendations put up on the Ministry's official website (www.

envfor.nic.in) indicate that the Project Proponents will have to carry out an Environment Clearance Public hearing for the project as the project is being treated as a B1 project under 8(b) Township and Area Development projects. The proponents have also been asked to give a point by point clarification of all the issues raised in the representations sent to the Committee by JJVS, Him Niti Abhiyan and EQUATIONS.

- In April 2008, the High Court disposed off the Civil Writ Petition (CWPs) saying that they were satisfied with the state government's action of constituting a High Powered Committee under the Chairmanship of Secretary (Tourism) to look into various aspects relating to setting up of Himalayan Ski Village. According to a media report in December 2008, the high powered government committee was slated to do spot inspection and record resident views early January 2009. However, local groups boycotted this as they were not provided basic documents related to the project – a demand they have been making for years now. A public consultation was then held in June 2009 on the Ski Village project by a State level review committee. During the consultation representatives of people, Mahila Mandals and Panchayats rejected the project in one voice.

The Victory

The Committee in its report noted the non-acceptability of the project by the local community, who are the main stakeholders and that even until October 2009 HSV had not carried out an environmental impact assessment. It was further noted by the Committee, “that tourism is an economic activity, so it becomes necessary to spread its benefits to the community when we plan or develop... Development has to be in a manner that keeps in mind the well being of local people as well as the environment... Community participation is a must to develop and decentralise the development sector effectively... Such projects on the basis of single proposal received by the Government of Himachal Pradesh because of the non-acceptability and non-participation remains a non-starter” .

Lessons learned from the campaign process

- **Timing of the Campaign** – What facilitated the campaign's success the most was that the campaign started almost as HSV had started acquiring land in the region. Therefore at no point was the tourism development ahead of the campaign.
- **Strong People' Struggle** – The group which initiated the struggle was a strong one. Further, the community which would be affected by the project was reached out to and mobilised. This mass mobilisation resulted in 10 out of 12 Panchayats passing resolutions against the project. The campaign also received support from other organisations and movements in Himachal Pradesh like the Jan Hit Sangharsh Samiti Jan Jagran Evam Vikas Samiti, Him Niti Abhiyan and Lok Vigyan Kendra and national level organisations like EQUATIONS, which along with wider support also helped with the fact finding process.
- **The Fact Finding Process** – As mentioned above, what facilitated the process was the immediate response of the community and other organisations in addressing this issue. However, there was also a shortage of time to respond to the project development since the Company was proceeding at a very fast pace. The Right To Information route was not used for acquiring relevant documents from the government as that would take 30 days at a minimum, which could go up to 60 days. As there was not enough time to go through this process, documents were acquired through informal channels therefore limiting the use of them. For example, while the campaign knew about gaps in the project clearance, they could not be quoted in the fact finding report.

Secondary work, which is important to define the length and breadth of a fact finding process was not done due to the time constraint. This also influenced the composition of the fact finding team.

Therefore, the entire fact finding process from the selection of members, to data collection and report writing was done in a short span of time of one month. The translation of the fact finding report

into Hindi facilitated the mobilisation of people and publicising of the project itself

- **Pressure on the government** – The campaign maintained a constant oversight over the government leading to consistent pressure on them. The government was pressurised by the campaign to conduct a public hearing. Thus all opportunities to put pressure on the government including the use of elected representatives were used.

1 <http://www.sunmediaonline.com/indiachronicleoctober/investmentupdate.html>

2 *As per the Detailed Project Report*

3 <http://www.tribuneindia.com/2005/20051228/himachal.htm>

4 *Asher, Manshi (2008)*

5 *Arora, Vijay. 30th April 2008, Himalayan Ski Village, HC Disposes of Plea, The Tribune, (<http://www.tribuneindia.com/2008/20080501/himachal.htm#8>) (accessed on 1st December 2010)*

6 *(2009) Report on Review / examination of the project Himalayan Ski Village in Kullu District, Himachal Pradesh, submitted by a Committee constituted by the State Govt on Directions of the Hon'ble High Court, H.P Page 66-84*

The Problems of Bringing Transnational Claims

Case Study on Indian Seafarers working on Foreign Ships – Krishnendu Mukherjee¹

In our increasingly integrated and globalised world, companies may be registered in one State, listed on the stock-exchange of another State, have a factory in another State, export to another State(s), and pay taxes in yet another *unrelated* State. Whilst this may make perfect business sense, in relation to raising capital, obtaining cheap labour, and access to markets, it makes it highly problematic for those who are seeking legal address against such transnational companies.

The Case of Indian Seafarers

A case in point are Indian national seafarers who work on ships owned by foreign companies. Many Indians seeking better employment opportunities, have joined cruise or merchant ships to work amongst other jobs, as waiters, room-boys, cooks and cleaners. The ships are owned by companies registered in the US or UK, the ships often use flags of convenience and they sail in a number of different legal jurisdictions.

For example, many Goa-resident Indian nationals have worked on ships owned by a British company P&O Cruises Limited (P&O), now part of Carnival (registered both in the USA and the UK). The workers are contracted for several months for specific cruises. It appears that the workers are formerly employed by an associate company of P&O called Fleet Maritime Services International (Bermuda) Limited which is registered in Bermuda. However, our understanding is that P&O require their Indian staff to sign an employment agreement stating that they accept P&O's offer of employment and that they abide by the terms and

¹ *Krishnendu Mukherjee is a barrister and advocate at Doughty Street Chambers, London*

conditions attached. It is further understood that throughout the term of the contract, the worker's employment is fully controlled by P&O, which dictates the job description, hours of work and provides the salary. The workers are provided with a British Seaman's Personal Record, but to complicate matters further they are recruited by Fleet Maritime Services (India) Pvt Ltd (Fleet Maritime) based in Mumbai, India which operate as agents for Fleet Maritime international (Bermuda) Limited.

Making a Complaint – A Legal Conundrum

Difficulties arise when these workers have a complaint with the company. Where should the complaint be lodged? With their ostensible employer registered in Bermuda?; their *de facto* employer based in the UK; or the agent of their employer based in Mumbai? The "Guide for New Sea Staff", which P&O provides to each new crew member, whilst detailing the duties and obligations of sea staff, is less detailed on the obligations of P&O to each sea staff, or indeed where a complain should be filed.

Similarly where should a legal claim, say an employment or tortious compensation claim against the company be filed? Should it be filed in Bermuda where the worker's employer, at least on paper, is registered? Should it be filed in the UK where there worker's *de facto* employer is based? Should it be filed where the employer's agent is based in India? Should it be filed in the place of the ship's registration, say Bermuda? If the cause of action leading to the legal claim arose on the ship whilst on the cruise, could there be another jurisdiction that could be more convenient or appropriate? A would-be claimant back in their home country is faced with the huge difficulties in ascertaining information, and obtaining correct legal advice, in order to file any claim or action to obtain redress.

Ms Bracyl D'Silva, a former employee



After nearly 10 years of loyal service with P&O, Ms D'Silva made a complaint in relation to her treatment by the company. She is still waiting for a proper response

This is not a hypothetical scenario, and to illustrate, one such case, amongst several that I have come across up till now. Ms Bracyl D'Silva commenced employment with P&O on the 5th March 1999 as a bar stewardess. In 2003 she received recognition as an employee of the month from P&O, and in 2006 she was promoted to assistant bartender and shortly afterwards her salary was increased to £390 per month. A provision in the UK Race Relations Act 1976 had allowed non-British seafarers to be paid at a differential rate to their UK counterparts.

Throughout her contacts with P&O, Ms D'Silva always received very good appraisals which have recommended her promotion.

In July 2005, Ms D'Silva developed a lesion and swelling on her right calf. A week later she developed a similar lesion on the left calf, causing her some pain. She consulted the ship's doctor. The doctor was unable to make a diagnosis and referred her to a specialist in Bergen, Norway, where the ship had docked. In Bergen, Ms D'Silva saw a specialist at the Haukeand University Hospital. In his letter of the 19th July 2005 the specialist diagnosed *erythem nodusum*, an immunological vasculitis. He prescribed Prednisolon, an oral steroid, at 30mg for 3 days, then reduced to 5mg every fifth day, until 10 mg for 3-4 weeks or at least until two weeks after the last lesion. In his opinion, the erythema nodosum could be induced by several diseases, including tuberculosis.

Most importantly he also advised, that because of a possibility that she might have tuberculosis, Ms D'Silva "*should not work until a Mantoux tuberculosis test is read to be negative*". He advised that: "*The problem is that a latent infectious (sic) disease can become worse during Prednisolon treatment and therefore we like to observe these patients for worsening*

of a not diagnosed, hidden disease. Therefore it could be better that she returns to her homeland in India and be followed by a doctor there”.

However, it is alleged that Ms D'Silva's request to be sent on immediate medical leave following this advice was refused by the ship's officers, and she was not in fact released from duty until 5 November 2005 (four months later), and then only because the *erythem nodusum* was not improving. This decision is somewhat surprising because the specialist's advice indicated a clear possibility that any latent tuberculosis might worsen unless treated, including the small risk of Ms D' Silva having the infectious pulmonary tuberculosis.

On return to Mumbai, Fleet Maritime took on the responsibility of Ms D'Silva's treatment without cost. Fleet Maritime's medical officer referred Ms D'Silva to a specialist. He in turn obtained a pathology report dated 10th November 2005 which indicated a positive Mantoux test for tuberculosis infection. It also indicated that, at that time, there was no indication of diabetes. Notwithstanding the positive Mantoux test, there was no further investigation or treatment for the tuberculosis infection. Instead, the specialist continued with the prescription of Prednisolon for several weeks until the *erythem nodusum* subsided. Ms D'Silva had therefore, in all, been treated with oral steroids for several months before the treatment was finally discontinued.

On 17th December 2007, Ms D'Silva joined P&O on another nine month contract. However, whilst on duty in June 2008 she again developed the *erythem nodusum*. The ship's doctor prescribed Prednisolon and she was advised to take 3 tablets of Prednisolon twice per day. One week later when the condition had not improved, Ms D'Silva returned to the ship's doctor who simply increased the Prednisolon from 3 tablets to 5 tablets twice per day. In August 2008, Ms D'Silva fainted on a number of occasions and lost 10kg in 3 weeks. The ship's doctor attributed this to the use of Prednisolon. Immediate medical leave was refused and no further investigations made. Ms D'Silva understands that medical leave was refused solely on the basis that she was needed on the ship.

On 13th August 2008, Ms D'Silva underwent her annual medical examination which showed high fasting blood sugar. The results were given on 14th August 2008 by the ship's doctor who allegedly informed Ms D'Silva: *"You have diabetes, and you have to leave the ship today, because you will die tomorrow from heart-attack, kidney failure and liver failure"*.

Ms D'Silva was extremely upset with this information, and the manner in which it was given. The ship's doctor was of the opinion, as expressed in his email of the 14th August 2008, that the diabetes nullified her medical certificate. Although the ship was only two days from Southampton, he arranged for her to be disembarked within a few hours in Bergen, and repatriated to India for immediate medical care. His differential diagnosis in the Medical Referral Letter dated 14th August 2008, included *"prednisolone induced diabetes"*, which remains a possible cause given Ms D' Silva's 37 years of age at the time and the lack of family history of diabetes. It is also understood that she was not provided with any advice as to what to do when faced with a diabetic attack.

On return to Mumbai, Ms D'Silva was subsequently diagnosed with a tuberculosis infection on 27th August 2008, for which she underwent treatment for 6 months. The steroid treatment also continued for several weeks more. When Ms D'Silva asked Fleet Maritime's doctor why she was not investigated or treated for tuberculosis infection in 2005 after the positive Mantoux test, she was told *"most people in India have tuberculosis"*. Ms D'Silva had her treatment paid for until 27th July 2009, when she was declared medically unfit for duties.

She continues to believe that the negligent diagnosis and treatment of this condition by P&O and Fleet Maritime, led her to contract severe diabetes in August 2008, which has damaged her health, made it difficult to have steady employment and which has severely curtailed her quality of life.

Barriers to Pursuing a Claim

If such a legal grievance had occurred to a UK-resident who was directly employed by P&O, then there would anyway have been significant barriers in bringing a claim against P&O in the UK. A would-be claimant would have difficulties in finding a solicitor who would take on the claim against P&O. With the restriction on public funding for these types of cases, this would be on a “no win, no fee” basis. The solicitor’s firm would assess the merits of a claim to decide whether it should take on the claim. By definition these would be claims where there would be a strong prospect of success of eventually succeeding at trial. Even where a solicitor’s firm takes on the claim on a “no win, no fee” basis, the claimant would be likely to have to pay some of the expenses, including the costs of filing the claim and for an expert who would provide evidence that the wrongful diagnosis and treatment caused, in Ms D’Silva’s case, the premature onset of diabetes. This would be in the region of £600 for filing and £1500 for an expert medical report. There would also be a further issue about whether to file against P&O Ltd itself, or Carnival UK Plc in the UK (depending of the degree of control and management operated by Carnival over P&O).

The difficulties for a non-UK resident, who is formally employed by a company registered in Bermuda, with agents registered in India, but who has in fact worked under the control of a company registered in the UK, which is owned by a transnational corporation registered in both the US and UK are far more substantial. Ms D’ Silva first contacted Fleet Maritime in Mumbai in September 2008 with her claim that P&O treated her negligently. The then Director, Personal Manager and Human Resources Manager advised her to write a letter which she did dated 20th October 2008, to which no reply has been received. On the 12th February 2009 Ms D’Silva wrote an email to Neil Martin at Carnival UK Plc to which she allegedly received no reply. On the 25th June 2009, she again drafted a letter to Fleet Maritime highlighting her allegations of negligence against P&O and Fleet Maritime. There was no reply to this letter but on the 13th August 2009, Ms D’ Silva received a letter signed by the HR Officer of Fleet Maritime (but with P&O logo on

it) stating that she had been declared permanently unfit for sea duties as of the 27th July 2009 and that all medical reimbursements would cease as of that date. The ostensible reason why Ms D'Silva was declared medically unfit according to an email from Norma Wayne, the Medical Case Supervisor, was: *"due to the tubercular erythema nodosum that we had allowed to return to work before with the same condition and since she has reoccurred that she is not fit for work at sea"*. Ironically, it was that reoccurrence of this condition that Ms D's Silva alleges was due to the alleged negligence of P&O and Fleet Maritime.

Ms D'Silva did not file any claim in India. The lower Courts are not used to dealing with negligence claims. There are lengthy delays in the proceedings, difficulties in obtaining evidence, and the ultimate conclusion is unclear. In desperation Ms D'Silva filed a complaint in the State Minorities Commissioner, Mumbai. This is a forum for addressing complaints of discrimination against minorities in Maharashtra, and would not be appropriate in relation to a complaint against a transnational company. Fleet Maritime were named as one of the Respondents. Unsurprisingly the complaint was dismissed, but not until Fleet Maritime had filed a reply stating that they were in fact only the agents of the employers Fleet Maritime Services International (Bermuda) Limited.

In July 2010 Ms D'Silva instructed an Indian advocate. The advocate wrote to Carnival UK Plc on the 21st August 2010, with a letter before claim with enclosures. The letter was transferred to Fleet Maritime, who then allegedly contacted Ms D'Silva to ask her what she wanted. No response was given to the letter by Carnival UK Plc itself. There was no reply to Ms D'Silva's advocate. Neither has there been any substantive response to a letter sent on 18th November 2010. In April 2011, Ms D'Silva's advocate sent a Race Relations Questionnaire (RR65) in relation to her claim that she faced adverse treatment because of her race, to which there has been no response from P&O. Further, a draft claim form was sent in June 2011, to which there has been no proper response by P&O either. Ms D'Silva also found contacting an instructing a UK solicitor to be problematic given the problems of finding a firm

with some knowledge of transnational claims and also because of the difficulties in providing any of the costs whatsoever.

Even if a claim had been filed against P&O, there remain a number of additional legal issues which affect transnational claims. It remains possible that P&O may have disputed that the UK was the most convenient jurisdiction for the claim to be decided. The question of who was Ms D'Silva's actual employer would be relevant. If the negligence alleged is of Fleet Maritime, the degree of knowledge and control that P&O had in relation to Ms D'Silva's treatment is relevant, to prove the company's legal liability. That issue would need to be proved through evidence of the nature of the relationship between P&O and its associate firm in Mumbai.

The above facts indicate the logistical, procedural and legal barriers facing a claimant in bringing a claim against a foreign-registered transnational company. Unfortunately, Ms D'Silva's case is not unique. There are probably hundreds, perhaps thousands, of individuals in India who have legitimate complaints or legal claims against transnational companies and who are unable to find any effective redress. Under the recently approved; *"UN Guidelines on Business and Human Rights"*, transnational companies have a moral and legal obligation to respect human rights, States have an obligation to protect their citizens, but there is certainly a huge gap in the provision of an effective remedy to redress violations.

Better Accountability for Transnational Corporations

Certainly, the domestic legal systems have to be made more effective. In India, there needs to be an effective means of obtaining injunctions and compensation against violating companies operating within the country. There should be a compulsory recourse to mediation to avoid the expensive and, in many cases, pointless litigation that may occur when a claim is taken. In the global world, as illustrated by the above example, courts need to be willing to look at the realities of employment relationships to see whether or where responsibility and liability should

properly lie. Firms in countries where transnational firms are registered have to understand the realities of potential claimants contacting them from abroad, understand the legal implications and provide simple access to legal advice.

So-called “soft law options”-voluntary instruments which are non-legally binding, but which nonetheless provide some avenue for making complaints against the behaviour of transnational companies, are increasingly being used. One such instrument is the OECD Guidelines for Multinational Enterprises which has been revised in May 2011. The revised Guidelines contain a Chapter on Human Rights which recognise that if States are to protect the human rights of their citizens, against violations of multinational enterprises there must be effective judicial and non-judicial mechanisms to do so. The commentary on the Chapter states inter alia:

“When enterprises identify through their human rights diligence processor or other means that they have caused or contributed to adverse impact, the Guidelines recommend that enterprises have processes in place to enable remediation. Some situations require co-operation with judicial or State-based non-judicial mechanisms. In others, operational-level grievance mechanisms for those potentially impacted by enterprises’ activities can be an effective means of providing for such processes when they meet the core criteria of: legitimacy, accessibility, predictability, equitability, compatibility with the Guidelines and transparency, and are based on dialogue and engagement with a view to seeking agreed solutions. Such mechanisms can be administered by an enterprise alone or in collaboration with other stakeholders and can be a source of continuous learning. Operational level grievance mechanisms should not be used to undermine the role of trade unions in addressing labour-related disputes, nor should such mechanisms preclude access to judicial or non-judicial grievance mechanisms, including the National Contact Points under the Guidelines”.

The Guidelines also recommend that enterprises, “should be guided throughout their operations by principle of equality of opportunity and

treatment in employment and not discriminate against their workers with respect to employment or occupation on grounds as race, colour, sex, religion, political opinion, national extraction, social origin, or other status unless selectivity concerning worker characteristics furthers established governmental policies which specifically promote greater quality of employment opportunity or relates to the inherent requirements of the job”².

The OECD Guidelines (both the previous and current editions), therefore recommend that transnational corporations, such as P&O, should have a proper complaint redressal system which does not discriminate between workers on the basis of nationality or place of residence. In the circumstances of Ms D’Silva’s case, she should have been provided with a contact to complain to, her correspondence to Fleet Maritime should have been replied to promptly, and her advocate’s letters to P&O should have been treated professionally. This did not happen, indicating how far companies generally are from respecting the human rights of the people in the countries in which they operate. A complaint to the UK Contact Point for the OECD Guidelines has been made by Ms D’Silva against Carnival UK Plc.

There is an increasing number of transnational corporations based in the US and Europe seeking to invest and expand their operations in Asia, Africa and in other expanding economies. Already, we are seeing many western companies buying up companies in India in order to relocate their operations where there is cheaper labour and lower social and environmental costs to pay. There is a need for transnational companies to recognise that if they want to operate in these countries for the long-haul, they need to implement mechanisms to ensure complaints are dealt with expeditiously, and not hide behind corporate veils and malfunctioning legal systems to avoid their moral and legal responsibilities.

² *Employment and Industrial Relations, Chapter V, 1(e).Employment and Industrial Relations, Chapter V, 1(e).*

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