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**Centre for Legal Research**

Working Paper No. 2

# **Business, Human Rights and the Environment**

## **A Case Study of India**

Prepared for the European Commission project on the 'Study of the Legal Framework on Human Rights and the Environment applicable to European Enterprises operating outside the European Union'.

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# **Business, Human Rights and the Environment:**

## **A Case Study of India**

### **BACKGROUND**

This Working Paper is part of a project on the ‘**Study of the Legal Framework on Human Rights and the Environment applicable to European Enterprises operating outside the European Union**’. The University of Edinburgh was awarded the tender to conduct the above study of behalf of the European Commission in 2009-10 and this Working Paper was commissioned to Dr Jona Razzaque of Department of Law, Faculty of Business and Law, UWE Bristol.

With this project, the European Commission seeks to clarify the existing legal framework for human rights and environmental issues applicable to European enterprises operating outside the European Union (EU). This project also aims to provide a basis for possible measures to further operationalise the UN 'Protect, Respect, Remedy' Framework put forward by the Special Representative of the UN Secretary-General on Business and Human Rights, Professor John Ruggie.

The UN ‘Protect, Respect and Remedy’ Framework (A/HRC/8/5) builds on three pillars:

- the state duty to protect human rights from corporate abuses,
- the corporate responsibility to respect human rights, and
- an effective access to remedies for victims of corporate human rights violations.

The three pillars form a complementary whole in that each supports the others in achieving sustainable progress. While primarily geared towards the protection of individuals against corporate abuses of human rights, the UN Framework also aims at enhancing the legal certainty for, and protecting the legitimate interests of, businesses operating abroad.

The EC project complements, and extends beyond, the UN Framework in that

- it focuses on European law and European Member State law applicable to European enterprises operating outside the European Union,
- it considers environmental law in addition to / in conjunction with human rights law.

In doing so, the project

- summarises European law and the law of selected EU Member States relevant for the protection of human rights and the environment and applicable to European enterprises operating outside the European Union,
- identifies governance gaps, difficulties for victims in accessing justice, and areas of legal uncertainty for European enterprises operating outside the EU, and
- identifies opportunities for the EU and its Member States to contribute to the operationalisation of the UN Framework from a European perspective.

Further information on this project is available at <http://www.law.ed.ac.uk/euenterpriseslf/>

The European Commission report is available at

[http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index\\_en.htm#h2-1](http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index_en.htm#h2-1)

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## BIBLIOGRAPHY

## **1. INTRODUCTION**

This working paper is part of a study on the legal framework on human rights and the environment applicable to European enterprises operating outside the European Union (EU).

This paper identifies and analyses

- particular cases of violations of human rights and environmental law by European enterprises in India,
- the Indian legal mechanisms applicable to European enterprises, including practical barriers to legal accountability and law enforcement,
- the availability and effectiveness of non-legal remedies in India pertaining to violations of human rights and environmental law by European enterprises.

This paper highlights that the Indian regulatory and accountability mechanisms are sometimes not strong enough to control the behaviour of European corporations in their own country, which leads to an argument for improving the EU legal framework on human rights and the environment.

Part 2, 3 and 4 of the paper consider three case studies. The first case study is linked to conflicts between the company and the local community over control of natural resources (e.g., mining activities). The second case study relates to the production and management of hazardous waste. The issue of hazardous waste first came to global attention through the 1984 Bhopal tragedy and a number of incidents across India show growing occurrences of air, water and soil contamination. With the change of global consumption pattern, the third case study relates to risks associated to genetically modified organisms. The conclusion (part 5) considers regulatory weaknesses and the availability and access to remedies in the host state.

## **2. MINING AND FORESTRY RESOURCES**

India is currently a global producer of chromite, coal, iron ore and bauxite. Since the formulation of the National Mineral Policy in 1993, India has made a good progress in attracting foreign investment in its mining sector, with attractive incentives. The National Mineral Policy was revised in 1994 allowing private investment (both domestic and foreign) to explore and exploit a number of minerals including Iron – ore, Copper, Manganese, Lead,

Chrome ore, and Zinc.<sup>1</sup> As a result, several foreign companies have begun investing in India, with the majority coming from Canada and the USA, followed by Australia, the UK and South Africa. Vedanta Resources Plc, a company registered in the UK, is operating several mining projects in India, including the one in Niyamgiri, Orissa. Sustainable development is a key element of how Vedanta operates its business and one of the aims of the company is to minimise damage to the environment from the projects and ‘to make a net positive impact on the environment wherever we work.’<sup>2</sup>

## **2.1 MINING IN NIYAMGIRI HILLS BY VEDANTA**

In 2004, Vedanta Resources Plc obtained permission to construct an alumina refinery at Lanjigarh in Kalahandi district, Orissa state. The operations of this refinery were closely linked to the mining of bauxite sourced from the nearby Niyamgiri Hills, and the mining was originally considered part of Vedanta’s operations in the area. The company needs the Niyamgiri bauxite to feed the Lanjigarh alumina refinery to reduce unit operating costs.<sup>3</sup> In order to construct the alumina refinery, Vedanta obtained environmental clearance from the Ministry of Environment and Forests of India as required under the Environmental Impact Assessment law. Vedanta’s Indian subsidiary, Sterlite Industries India Limited, got the clearance as they have signed a Memorandum of Understanding with the state government of Orissa to extract bauxite from the Niyamgiri hills. Sterlite also needed permission to clear the forest under the Forest Conservation Act 1980 to divert forest land for non-forest use. In March 2005, the Ministry of Environment and Forests granted the forest clearance to Sterlite. During this period, Vedanta Resources Plc substituted Vedanta Alumina Ltd for Sterlite.

In 2004, three petitioners (Wildlife Society of Orissa, the Academy of Mountain Environics and an environmental activist) complained to the Central Empowered Committee. This Committee was established by the Supreme Court of India in 2002 to monitor and ensure the compliance of the orders of the Supreme Court. The Committee monitors any breach of procedures under the Forest Conservation Act 1980 and reports its findings and recommendations to the Supreme Court of India. In this complaint, the petitioners pointed out that the mining proposed in the Niyamgiri Hills was likely to have a devastating impact on

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<sup>1</sup> Indian Bureau of Mines, Mining Laws, available at: <http://ibm.nic.in/mininglaws.html>

<sup>2</sup> Vedanta Resources Plc, Annual Report 2009, available at: [http://www.vedantaresources.com/uploads/ar2009final\\_website.pdf](http://www.vedantaresources.com/uploads/ar2009final_website.pdf)

<sup>3</sup> Ibid.

forest, wildlife, and the tribal community. The petitioners alleged that Vedanta Alumina Ltd cleared a large section of the forests while the forest clearance application was pending and the tribal community was forcibly evicted from their homes.

After hearing both sides, in 2005, the Central Empowered Committee recommended to the Supreme Court of India to revoke the environment and forest clearance on the grounds that

- (i) the mining operations will have an adverse effect on the local environment and the lives of the Dongria Kondh community; and
- (ii) the area came under Schedule V of the Indian Constitution, which prohibits the transfer of tribal land to a non-tribal group.

While the recommendations were being considered by the Supreme Court of India, the Norwegian government, in 2007, withdrew its fund from Vedanta Resources Plc as the company was contributing to environmental damage and human rights violations. Similarly, during 2009-10, Edinburgh-based investment managers Martin Currie, the BP Pension Fund and Church of England have also withdrawn their funds from Vedanta Resources Plc. More recently, in February 2010, the UK based Joseph Rowntree Charitable Trust sold its Vedanta shares.<sup>4</sup>

In 2007, the Supreme Court of India dismissed Vedanta Alumina Ltd's application to use the forest land for bauxite mining on the Niyamgiri Hills in Lanjigarh. It suggested a comprehensive rehabilitation package for Vedanta Alumina Ltd and if the company accepted this package, it could re-submit an application to the Supreme Court. As part of the rehabilitation package, the Supreme Court of India asked the Orissa state government to carry out the demarcation of the lease area, the identification of an area for compensatory afforestation, rehabilitation, the phased reclamation of the mined area, specific and comprehensive plans for wildlife management and for the development of tribals. The Vedanta Alumina Ltd, the Indian subsidiary of Vedanta Resources Plc, was ordered to contribute to these projects from the annual profit it makes from the Lanjigarh mining project. In 2008, the company accepted the package and the Supreme Court of India approved the clearance of the forest for bauxite mining.

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<sup>4</sup> K. Hopkins, Rowntree trust sells shares in Vedanta over human rights fears, The Guardian, 18 February 2010,. Available at: <http://www.guardian.co.uk/business/2010/feb/18/rowntree-trust-pulls-out-from-vedanta-resources> (Accessed 28 February 2010).

In the same year, Survival International, a non-governmental organisation (NGO), sent a petition to the UK National Contact Point (NCP) of the OECD Guidelines for Multinational Enterprises.<sup>5</sup> The petition was against Vedanta's bauxite mine in the Niyamgiri Hills.<sup>6</sup> In this petition, the Survival International argued that India, by allowing Vedanta to continue this mining operation has breached several international obligations and commitments. Noting that Vedanta Resources Plc is not a member of Global Compact, the petitioner argued that:

- (i) Vedanta has not obtained free, prior and informed consent of indigenous people whose land and other resources are being affected by the project.<sup>7</sup>
- (ii) Vedanta should follow the Akwé: Koh Guidelines and commission an indigenous rights impact assessment.<sup>8</sup>
- (iii) Under the OECD Guidelines, Vedanta has failed to
  - to respect the human rights of those affected by its activities in a manner consistent with the host government's international obligations and commitments [chapter II (2)];
  - to develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate [Chapter II (7)]; and
  - to engage in adequate and timely communication and consultation with the communities directly affected by its environmental, health and safety policies [Chapter V(2)(b)].

In 2009, the OECD UK NCP held that Vedanta has not complied with Chapter V (2) (b), chapter II (7) and chapter II (2) of the OECD Guidelines.<sup>9</sup> It concluded that

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<sup>5</sup> The UK National Contact Point, part of the Department for Business, Innovation and Skills, initially aims to bring parties together to mediate a solution to complaints brought against UK registered multinationals or foreign multinationals operating in the UK. If it considers that a company has not met the requirements of the Guidelines, the UK NCP will issue a statement detailing this decision and making recommendations on how the firm can come into line with the Guidelines in the future.

<sup>6</sup> Survival International, Complaint to the UK National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises (19 December 2008). Available at: [http://assets.survivalinternational.org/documents/96/Survival\\_complaint\\_VEDANTA.pdf](http://assets.survivalinternational.org/documents/96/Survival_complaint_VEDANTA.pdf).

<sup>7</sup> 2007 UN Declaration on Indigenous Rights.

<sup>8</sup> Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to take place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities, decision VII/16 F, adopted by the seventh meeting of the Conference of the Parties to the Convention on Biodiversity (2007).

<sup>9</sup> Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Complaint from Survival International against Vedanta Resources plc, 25 September 2009.



Vedanta failed to put in place an adequate and timely consultation mechanism fully to engage the Dongria Kondh, an indigenous community who would be directly affected by the environmental and health and safety impact of its plans to construct a bauxite mine in the Niyamgiri Hills, Orissa, India.

The UK NCP asked Vedanta to

- (i) consult with the Dongria Kondh and refer to the Akwé : Kon Guidelines.
- (ii) include a human and indigenous rights impact assessment in its project management process and consider implementing John Ruggie's suggested key steps for a basic human rights due diligence process:<sup>10</sup>
  - adopting a human rights policy which is not simply aspirational but practically implemented;
  - considering the human rights implications of projects before they begin and amend the projects accordingly to minimise/eliminate this impact;
  - mainstreaming the human rights policy throughout the company, its subsidiaries and supply chain;
  - monitoring and auditing the implementation of the human rights policy and company's overall human rights performance.

The UK NCP concluded that

...whichever self-regulatory practices Vedanta chooses to adopt in order to minimise the risk of further breaches of the Guidelines in the future, it is essential that these practices, particularly the human and indigenous rights impact assessments and the adequate and timely consultation with all the affected communities of a project, do not remain "paper statements" but are translated into concrete actions on the ground and lead to a change in the company's behaviour.

[para. 80]

It is interesting that after this Final Statement in 2009, Vedanta has questioned the legal right of UK NCP to comment on the possible impact of a project being developed in India and that complies with Indian legislation.<sup>11</sup> According to the Company, they are working with the

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<sup>10</sup> Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, United Nations, 7 April 2008, paragraphs 59-64.

<sup>11</sup> Author unknown, Vedanta condemns UK agency's findings, *Business Standard*, 14 October 2009.

Government agencies in line with the direction given by the Supreme Court of India. The Government of Orissa has formed a ‘Special Purpose Vehicle’ known as the Lanjigarh Project Area Development Foundation involving the Government of Orissa, Sterlite Industries and Orissa Mining Corporation as its stakeholders. This Foundation aims to undertake majority of the projects in the areas of Health, Education and Infrastructure in both Kalahandi and Rayagada district or Orissa.<sup>12</sup> In its official website, Vedanta uses the Niyamgiri hills development as an example of sustainable development where the company is working with local NGOs and communities, investing in improving local amenities and conducting needs assessment studies.<sup>13</sup>

In the Follow up Report to the Final Statement,<sup>14</sup> the UK NCP summarised the submission from Survival International on their visit to Orissa. After few meetings with the indigenous communities in the proposed mining sites, Survival International concluded that:

Vedanta has declined to alter its conduct in any way following the recommendations made by the UK NCP in the Final Statement. Survival International stated that Vedanta has not yet commissioned a human and indigenous rights impact assessment and has made no attempt to engage with the Dongria Kondh. According to Survival International, the Dongria Kondh they visited and many others living in close proximity to the site of the proposed mine, will be immediately and detrimentally affected by any mining operations that are allowed to take place there. [para. 15]

According to Vedanta, however,

...the construction of the bauxite mine is being progressed in compliance with Indian law and regulations, in joint venture with the Government of Orissa and with the approval of the Supreme Court of India and central government. Vedanta reported that a “Special Purpose Vehicle” had been set up to deliver the project, as instructed by the Supreme Court of India, to ensure that some resources

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<sup>12</sup> Author unknown, Orissa Government, Sterlite form Lanjigarh Area Development Foundation, Orissa Business News, 15 October 2009.

<sup>13</sup> Sustainable Development: Impacting the grassroots, available at: <http://www.vedantaresources.com/impacting-grassroots.aspx>

<sup>14</sup> Follow up to Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises Complaint from Survival International against Vedanta, 12 March 2010. Available at: <http://www.bis.gov.uk/assets/biscore/business-sectors/docs/survival-international-against-vedanta-resources.pdf>

generated go towards developing local infrastructures. Vedanta also highlighted the development opportunities provided by the project, including the creation of new jobs and local infrastructure. [para. 18]

Vedanta stated that “the company has in place a policy for engaging with local communities and is already engaging with the Dongria Kondh through the Orissa-Government-sponsored Dongria Kondh Development Agency (DKDA) and will continue this relationship.” [para. 19]. Vedanta concluded that their consultation processes fully comply with Indian legal requirements (host state) and in line with UK NCP’s recommendations contained in the Final Statement.

In its conclusion, the UK NCP encouraged ‘Vedanta and Survival International to engage with each other in order to achieve a mutually satisfactory outcome.’ This is unlikely to happen for several reasons: First, Vedanta declined the NCPs initial offer for mediation and refused to engage with the NCP's process or submit any evidence to the NCP to substantiate its claims. In the Indian national media, Vedanta also questioned the jurisdiction of UK NCP to conduct investigation on a project based in India. Second, there is a lack of trust between Vedanta and Survival International. This is apparent from the submissions and follow-up submission of Vedanta and Survival International to the UK NCP. Survival International, in its response to the Final Statement, alleged that Vedanta hired locals to threaten and intimidate Survival employees and their guides. Survival International also alleged that Vedanta had warned the local police authorities and media about Survival International’s and other foreign NGOs’ movements in Orissa. Vedanta denied that it has paid local villagers to obstruct Survival International’s activities or to object to their presence in Orissa. Third, in its reply to UK NCP’s Final Statement, Vedanta reaffirmed their position by stating that there is no displacement of any community from the project area and that the company is complying with Indian law.

This decision from the UK NCP is unlikely to have any impact on legal development in India. The decision does not target the host state, the Final Statement does not deal with the application of the law of either the place where the purported breaches occurred (host state) or the law of the place where the undertaking has its headquarters or is registered (home state). What this decision shows, however, is the direct imposition of international law on non state actors (Vedanta), and the critical role of civil society actors (e.g., Survival International)

in the enforcement of soft law principles. Although non-binding, this NCP decision highlights that there is a growing level of acceptance of human right due diligence as a standard of care owed by companies such as Vedanta on the tribal community such as Dongria Kondh.

## 2.2 LEGAL AND NON-LEGAL MECHANISMS IN INDIA

This case study shows that a number of legal instruments, including the Forest Act 1980, Environment (Protection) Act 1986 and Environmental Impact Assessment notification were applied before the mining in the hills could begin. At least three public bodies, the Government of Orissa (acquisition of land), Orissa State Pollution Control Board (issuance of no objection certificate), Ministry of Environment and Forests (issuance of environmental clearance) were involved in the process. In addition, the public interest litigation brought in the court by two NGOs and an environmental activist was allowed by the court. The rehabilitation package designed by the court takes into account the adverse environmental and health impact of the mining project.

However, there are some issues that require further considerations:

- ***Inability to pursue the parent company in the host state:*** The obligation of a state (home or host state) to investigate, punish and redress extends to those activities within its jurisdiction. It was possible to bring action against Indian subsidiaries of Vedanta, but not against the parent company, in India. The possible grounds to bring an action in the home state could be inadequate consultation with the indigenous community Dongria Kondh, failure to assess the socio-environmental impact of the mining project on Dongria Kondh and thus failure to respect international human rights commitments. Similarly, Vedanta Resources Plc works through subsidiaries incorporated in India making it difficult, although not impossible, to bring an action in the UK where the parent company is based. The extent of UK's obligations with respect to corporate activity outside UK is largely dependent on the authority or control of the corporation (Vedanta) over its subsidiary. For example, among its Indian subsidiaries of Vedanta Resources Plc are Sterlite Industries (India) Ltd and Vedanta Alumina Ltd, of which Vedanta owns 57% and 70.5% respectively. Both Sterlite and Vedanta Alumina were involved in the mining operations in Lanjigarh (Orissa). The Norwegian Council of Ethics, which investigated Vedanta's group structure in 2007, was "satisfied that Vedanta Resources, in its capacity of majority

shareholder, exercises considerable influence over its subsidiaries.” (i.e., under the close control of the parent company).<sup>15</sup> Therefore, it is possible for the UK to enact laws and establish practices to protect against human rights violations, which may include regulation of both companies and their subsidiaries. As the parent company based in the UK receives benefits (e.g., profits, patents) from its subsidiaries, it may be possible to impose direct liability on the EU based parent companies for the acts of their subsidiaries. As part of this liability regime, the home state government (here, UK) may lay down regulatory standards for parent companies to develop risk management systems, monitor compliance and establish system for non-compliance of subsidiaries.

- ***Lack of public consultation:*** Although Vedanta had been planning to mine the Niyamgiri hills, it is alleged that there was no effort by the state or the company to inform or consult the Dongria Kondh, the affected tribal community, about these plans. Vedanta did not provide any information on the project to the tribal community, and that means they could not go to the court to challenge the proposed project. National laws, such as the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 and Environmental Impact Assessment (EIA) notifications 2006,<sup>16</sup> are weak in defining the scope and nature of public consultation. The fact that the company requested a ‘rapid’ environmental impact assessment confirms the weakness of the environmental impact assessment process. This led to demonstrations and protests by the tribal community. This issue was highlighted by the Survival International’s petition to the UK NCP and the Final Statement by the UK NCP. By not consulting with the tribal community Dongria Kondh, Vedanta has failed to exercise adequate human rights due diligence in its operations in India.
- ***Weak application of indigenous rights:*** While the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 confirms rights of forest dwellers to own and live in the forestland and protect community forest resources, the Court did not apply this Act nor dealt with the issue of

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<sup>15</sup> Survival International 2008, 10.

<sup>16</sup> The 2006 notification is updated in 2009. The Draft Environmental Impact Assessment Notification, 19 January 2009 includes an amended Appendix IV on procedure to conduct public hearing. This hearing is conducted by the State Pollution Control Board or the Union Territory Pollution Control Committee.

consultation/consent of Dongria Kondh. India has signed the 2007 UN Declaration on Indigenous rights but these rights are not yet enforceable in the national court.<sup>17</sup> Without supporting national law, it is not possible for the Dongria Kondh to petition the Supreme Court or any other national tribunal on the ground that their international human rights have been violated.

- ***Inadequate monitoring of the rehabilitation package:*** While the government of Orissa accepts that the development of mines will result in the displacement and destruction of livelihood of the tribal community, it assures that the rehabilitation package is adequate. However, the local communities are concerned about the slow implementation and monitoring of the rehabilitation package. This fear is not irrational as other rehabilitation packages related to dam building projects (e.g., Sardar Sarovar dam project) and forest rehabilitation projects (e.g., Dehradun Valley case, Banwasi Seva Ashram case) show that the rehabilitation process can be lengthy and unsustainable.

### **3. TOXIC AND HAZARDOUS WASTE**

Economic liberalisation and rapid industrialisation, particularly the growth of high polluting industries, have posed a great challenge to India's environment. These industries generate huge volumes of hazardous and toxic waste in India. India is a Party to the Basel Convention on transboundary movement of hazardous wastes and has several national laws to control the handling, treatment, transport and disposal of hazardous waste in an environmentally sound manner. Twelve Indian States account for 97% of total hazardous waste generation and one of the top four waste generating states is Tamil Nadu. Unilever is one of the many multinational companies operating in the Tamil Nadu state of India. It is a dual listed company consisting of Unilever NV in Rotterdam, The Netherlands and Unilever PLC in London, UK. Both Unilever companies have the same directors and effectively operate as a single business.

#### **3.1 MERCURY POLLUTION IN KODAIKANAL, TAMIL NADU**

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<sup>17</sup> There are constitutional right and several human and environmental rights in India that the court could have applied to protect the indigenous community.

In 1983, US-based Chesebrough Ponds relocated its mercury thermometer factory from the USA to Kodaikanal in Tamil Nadu State. In 1987, the factory was acquired by Unilever when it bought Chesebrough Ponds. The plant's owner Hindustan Lever (now, Hindustan Unilever) is Unilever's Indian subsidiary. The Hindustan Unilever was manufacturing mercury thermometers for export, mainly to the USA.

In 2001, residents of Kodaikanal found mercury containing glass waste near to the thermometer factory run by the Hindustan Unilever. The residents protested about this illegal disposal of toxic waste (i.e. mercury) that is likely to cause adverse impact on worker's health and the environment. The local communities complained that the mercury waste was being dumped in the Pamber Shola watershed of the nearby Pamber river. Mercury is highly poisonous and exposure to even the small amount through air, water or skin, exerts severe effects on the central nervous system and kidneys. The local communities claimed that the death of several workers who worked in that factory could be linked to mercury poisoning. Some of the ex-workers claimed having symptoms linked to mercury poisoning due to unsafe working conditions. The NGOs and local communities complained to the Tamil Nadu Pollution Control Board about the illegal disposal of mercury. According to the Hindustan Unilever, mercury-tainted glass scrap had been sold in breach of the company's procedures. The Tamil Nadu Pollution Control Board ordered the suspension of all manufacturing operations of the company in March 2001, clean up of the toxic waste and decontamination of the site and surroundings to global standards. However, the company had already decided to close the factory in January 2001 as, according to the Unilever, this operation (i.e. production of thermometer) was not part of their 'core business'.<sup>18</sup>

In 2001, the Hindustan Unilever commissioned a number of environmental audits and studies. The Environmental Audit, URS *Final Report on Environmental Site Assessment and Risk Assessment for Mercury*, found that adequate health procedures had been in place and that there was no adverse health impact because of operations with mercury at the site.<sup>19</sup> However, the report also found discharge of mercury in the Pamber Shola watershed and evidence of air-borne emissions of mercury. The toxicologist report, commissioned by the company on environmental and health aspects relating to the thermometer factory, found no

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<sup>18</sup> Unilever, Environmental Performance Report (2003).

<sup>19</sup> Ibid.

evidence of health or environmental hazards. Separate from this process, the Department of Atomic Energy (National Centre for Compositional Characterization of Materials), a government agency, found that the atmospheric level of mercury is 1000 times higher than what is found in uncontaminated areas. An independent study conducted by the Greenpeace Research Laboratories found evidence of air-borne emissions of mercury along the hills surrounding the Kodaikanal lake and Pamber Shola watershed.

In 2004, the Supreme Court Monitoring Committee on Hazardous Waste visited the factory site and met representatives of the local community, NGOs and workers affected by the plant's operations. This Committee was set up in 2003 to pursue serious and chronic situations relating to management of hazardous wastes of India. It comprises of NGO and technical experts of the Government of India, appointed by the Supreme Court of India, for general oversight of the functioning of the State Pollution Control Boards in the regulation of hazardous wastes. The Monitoring Committee acknowledged that workers were affected by mercury and, remediation and rehabilitation of workers and the environment (e.g., forest, watershed, lake, air) are urgently needed. In October 2004,<sup>20</sup> the Monitoring Committee stated that the Tamil Nadu Pollution Control Board, under section rule 16 (2) of the Hazardous Waste Rules, 1989 (as amended) is mandated with the responsibility of rehabilitation of sites affected by hazardous wastes and chemicals. The Committee asked the Pollution Control Board to collect a fine of Rs 50 crore (GBP 7 million) from Hindustan Unilever as a revolving bank guarantee to undertake clean-up operations and to restore damaged and destroyed elements of environment by the factory in Kodaikanal. The company was also asked to set up health clinics to provide necessary facilities to enable genuinely affected people recover from the ill effects of mercury poisoning. In addition, the company has to set up a new, non-polluting enterprise, preferably based on locally available resources, especially for the employees of the thermometer factory who have been rendered jobless. In order to monitor the compliance of the various directions of the Supreme Court Monitoring Committee as well implementation of the action plan prepared by the Tamil Nadu Pollution Control Board, a Local Area Environment Committee was constituted for facilitating and monitoring programme implementation. The Committee consisted of independent members from the local area who enjoy public respect and confidence.

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<sup>20</sup> Report of the visit of the Supreme Court Monitoring Committee to Tamil Nadu, September 2004.



Residents and workers continued to protest about the delay in environmental clean-up and providing compensation to the workers. The environmental NGOs and local communities formed Tamil Nadu Alliance Against Mercury (TAAM) to identify contaminated soil. Environmental groups such as Greenpeace were vocal about the violations of the environmental principles of the Global Compact. The NGOs highlighted that the company discontinued occupational safety measures in the company from 1985 and provided no special training to the workers on the safety and health hazards that mercury causes. In 2006, the Madras High Court admitted a petition by ex-workers of the company seeking medical rehabilitation and compensation for health damages sustained by them and their family members as a result of exposure to mercury.<sup>21</sup> In 2007, the Expert Committee appointed by the Madras High Court did not find sufficient evidence to link the clinical condition of the factory workers to the mercury exposure in the factory.

Unilever has been listed on the Dow Jones Sustainability Group Index and FTSE4Good indices and the company participates in the UN Global Compact, United Nations Environmental Programme, World Business Council for Sustainable Development and the Forum for the Future. The bulk of the mercury dumping occurred before the Global Compact came into existence and some of the dumping occurred after the company joined the Compact in 2000. The Unilever website states,<sup>22</sup>

“We are committed to conducting our operations with integrity and with respect for the interests of our stakeholders.....We are also committed to making continuous improvements in the management of our environmental impacts and to working towards our longer term goal of developing a sustainable business.”

Taking note of this aim of Unilever, Greenpeace alleged that the company has violated the environmental principles of the Global Compact that require signatories to

- ‘support a precautionary approach to environmental challenges’ (Principle 7);
- ‘undertake initiatives to promote greater environmental responsibility’ (Principle 8); and
- promote the ‘diffusion of environmentally friendly technologies’ (Principle 9).

However, no complaint was made to Global Compact on this issue.

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<sup>21</sup> A.C. Fernando, *Business Ethics: An Indian Perspective* (2009), 66.

<sup>22</sup> Unilever, Corporate Responsibility, available at: [www.unilever.com](http://www.unilever.com)

According to the Unilever's website, the company removed more than seven tonnes of mercury-bearing waste and the soil beneath the waste in 2001. In 2003, Hindustan Unilever negotiated with the Indian and US Governments for permits to send the mercury-containing material to the US for recycling. The company then exported mercury containing glass scrap, effluent treatment plant residue, thermometers in various stages of manufacture and all stocks of mercury to the USA for mercury recovery and recycling. In its 2003 Environmental Performance Report,<sup>23</sup> Unilever stated that it continued with the soil remediation in the factory site. According to the company, the plant, machinery and materials used in thermometer manufacturing at the site were decontaminated in 2006. In 2009, the Tamil Nadu Pollution Control Board granted permission to the company to commence the remediation of the factory site. Pre-remediation work started in May 2009. It will take more than two years to complete the remediation of the soil and the decontamination of buildings at the site.

### 3.2 LEGAL AND NON-LEGAL MECHANISMS IN INDIA

After the 1984 Bhopal disaster, India has enacted the Public Liability Insurance Act 1991 and the National Environment Tribunal Act 1985. In 2009, the Green Bench is formally formulated to take account of environmental cases including cases dealing with toxic waste. There have been amendments made to the Factories Act (1948) in 1987 which mandate that information regarding potential hazards be given to persons residing in the vicinity of factories dealing with hazardous processes and substances. Generally, weak application of these laws by the government agencies means it is easier for the companies to get away with non-compliance or partial compliance of domestic law. In this case study, however, the Tamil Nadu Pollution Control Board took some actions, albeit inadequate, against the polluting company.

The case study also highlights a number of issues that require further considerations:

- ***Inadequate human rights protection in company policies:*** The Ruggie Report 2008 states that all human rights are relevant to corporations. This includes economic, social, cultural and collective rights as well as civil and political rights. Under the

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<sup>23</sup> Unilever, Environmental Performance Report 2003, available at: [http://www.unilever.com/images/2003%20Environmental%20Performance%20report\\_tcm13-5056.pdf](http://www.unilever.com/images/2003%20Environmental%20Performance%20report_tcm13-5056.pdf)

present structure of the international human rights legal system, corporations do not have the same legal obligations that states do in relation to international law. However, almost all companies operating across state boundaries have some type of corporate social responsibility policies that usually deal with social, environmental and ethical issues.<sup>24</sup> For example, Unilever, being a member of Global Compact, has guidelines on environmental and worker security. After the first allegation of mercury dumping was made, the Hindustan Unilever acknowledged responsibility for pollution and launched an investigation. The company closed down the mercury factory and launched a clean-up and soil decontamination. In the meantime, the parent company revised Code of Business Principles in 2002 that take into account human rights and the interests of employees. Reference is also made to promoting cooperation with (local) authorities, NGOs and trade unions and to help shape legislation that could affect Unilever's operations in the host state.<sup>25</sup> However, these are non-binding codes of the company and not enforceable in a court of law. Moreover, these policies or code are market driven and the focus is more on business and commercial impact rather than the protection of human rights.

- ***Weak international legal framework:*** For mercury pollution in Kodaikanal, Greenpeace alleges that Unilever is in breach of principle 7, 8 and 9 of Global Compact. No complaint was made to Global Compact as it is a voluntary initiative without any sanction or enforcement mechanism. There are other instances where complaints were brought against Unilever Plc regarding breach of labour rights under the OECD Guidelines for Multinational Enterprises. For example, in 2006, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF) brought a complaint to the UK NCP and the Dutch NCP on behalf of one of its affiliates, the Hindustan Lever Employees Union.<sup>26</sup> They alleged that Unilever is in breach of chapter I (7) and IV (6) of OECD Guidelines.<sup>27</sup>

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<sup>24</sup> [www.corporateregister.com](http://www.corporateregister.com)

<sup>25</sup> Unilever, Code of Business Principles (2002), available at: <http://www.unilever.com/images/ir20090505CoBPleafletfinalcm1312290.pdf>

<sup>26</sup> Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises Complaint from the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations against Unilever plc on India's Sewri factory (9 November 2009), available at: <http://www.bis.gov.uk/files/file53724.pdf>

<sup>27</sup> This case was not decided by the UK NCP as, in October 2009, both parties informed the UK NCP that they had reached a mediated settlement in India, addressing all the issues raised in IUF's original complaint.

While parties in this instance reached a mediated resolution, this does not negate the fact that NCP decisions are not binding and legally enforceable.

- ***Conflicting scientific reports:*** The scientific reports submitted by the company in 2002 showed that there is no adverse impact on environment and health, except limited impact on the soil at some parts of the factory, which requires remediation. On the other hand, the reports by the Greenpeace (NGO) and the Department of Atomic Energy (public body) in 2003 found high levels of mercury around the factory site. These conflicting conclusions from various reports make it difficult to assess the nature and level of harm caused to the workers, local community and the environment.
- ***Lack of information:*** Without adequate and effective mechanisms for access to information, it becomes difficult to prove misconduct or enforce a response from the company. According to Greenpeace, the Hindustan Unilever is alleged to have refused to give ex-workers their health records and to have opposed any independent health or environmental survey. Without such information, the community and workers have been unable to seek remediation for the health and environmental damage caused by mercury pollution in their area.<sup>28</sup> Lack of information prevented them from campaigning earlier for safer working conditions or from choosing to leave the factory.
- ***Weak access to remedy:*** The criminal law of India respects corporate veil and does not criminalise the company or management running the company. For Kodaikanal mercury pollution, class actions under civil law or the law of torts against multinational companies were not considered as these avenues remain underdeveloped in India. Moreover, issues like delay in deciding cases and the need for scientific and medical evidence make litigation in the area of hazardous waste quite difficult. As the case study shows, the public interest litigation brought by ex-employees was dismissed by the Madras High Court due to lack of sufficient scientific evidence. It was, however, possible by the local communities to complain to the Tamil Nadu Pollution Control Board (government agency) about the illegal

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<sup>28</sup> Greenpeace, Corporate Crimes: The need for an international instrument on corporate accountability and liability (2002, Greenpeace International).

disposal of mercury and, later on, the Supreme Court Monitoring Committee was involved in the process.

- ***Lengthy remediation and cleaning up process:*** In Kodaikanal, the remediation process has just started. This could be a lengthy process if one takes into account the Bhopal case where the Dow Chemical Company (the new owner of Union Carbide) is yet to decontaminate the factory site. Recently, the US lawmakers have requested the Dow Chemical Company to meet the medical and economic rehabilitation and clean up cost of in and around the factory site.<sup>29</sup> In 2003, the Indian government took account of the Bhopal disaster and the Kodaikanal incident and formulated guidelines on ‘The Charter on Corporate Responsibility for Environmental Protection’ for seventeen polluting industrial sectors.<sup>30</sup> However, these are non-binding guidelines and there is no pressure for the implementation of these guidelines. In Kodaikanal, the Supreme Court has set up a local committee that includes local NGOs and representatives from the affected community. Involving local community in the monitoring process is a positive development.

#### **4. GENETICALLY MODIFIED CROPS IN INDIA**

India has about 114 crore population, 75% of which are dependent on agriculture for their livelihood, about 85% are small and marginal farmers and there are millions of landless rural people suffering from food, nutrition and livelihood insecurity. For India, genetically modified (GM) crops offer many opportunities, such as the use of fewer pesticides and ensure food security. These GM crops can be herbicide-, pest-, or disease-resistant transgenic plants. India has the largest biotechnology research programme in the developing world, and has set up a National Biotechnology Board in 1982 and a government Department for Biotechnology in 1986.<sup>31</sup> Several multinational companies, both home-grown and foreign, are operating

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<sup>29</sup> Available at: <http://www.indianexpress.com/news/us-lawmakers-ask-dow-to-clean-up-bhopal/478293/0>. Moreover, the US second Circuit court has reinstated the case brought by the Bhopal victims against Union Carbide (November 2008).

<sup>30</sup> Part 3 (Chlor-Alkali Industries) deals with mercury pollution. Central Pollution Control Board, Ministry of Environment and Forests (March 2003). Available at: <http://hspcb.gov.in/Charter%20on%20corporate%20responsibility%20for%20Env.%20Protection.pdf>

<sup>31</sup> S. Johnston *et al*, Internationally funded training on biotechnology and biosafety: Is it bridging the biotech divide? (UNU-IAS, 2008), 28.

their activities in commercialising GM crops in India. The case study deals with Aventis, a French company, now part of Sanofi-Aventis. Aventis signed the Global Compact in 2000.

#### 4.1 BT MUSTARD AND AVENTIS

India, a party to the Convention on Biodiversity and having ratified the Cartagena Protocol in 2003, is committed to the safe handling of GM organisms. Bt cotton was the first transgenic crop to be released in India. After its introduction in 2002, there has been a lot of controversy surrounding its performance and impact on the environment and biodiversity.

Around the same time, the ProAgro/Aventis<sup>32</sup> sought to commercialise GM mustard in India. This GM mustard was claimed to be resistant to herbicide and the company claimed that the gene modification would help increase mustard productivity. In 2002, Gene Campaign questioned the safety of the Bt Mustard and the transparency of the decision making procedures of the Genetic Engineering Approval Committee of India, a government agency.<sup>33</sup> They alleged that the food and safety studies were conducted by the company without any participation from the government scientists and the crop trials were inadequate.<sup>34</sup> In 2003, the Genetic Engineering Approval Committee of India deferred the decision on the commercial cultivation of GM mustard indefinitely following the controversy surrounding the reliability of the field test conducted by ProAgro.

Since the commercialisation of Bt Cotton, NGOs such as Gene Campaign have been voicing their concerns about the inadequacies of the regulatory mechanism to control the potential environmental and health hazards of GMOs. In 2004, Gene Campaign brought a public interest litigation challenging the validity of the national legislation dealing with GM issue. In 2005, another public interest litigation requested the court not to allow any release of GMOs into the environment by way of import, manufacture, use or any other manner unless certain specific precautions are taken. In 2006, the Supreme Court of India directed the

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<sup>32</sup> Proagro-PGS belonged to the Dutch holding company Biogenetic Technologies B.V. (BGT), which was acquired 100% in 1999 by the German TNC Hoechst Schering AgrEvo GmbH, which merged with the French Rhône Poulenc SA to form Aventis CropScience.

<sup>33</sup> Suman Sahai, Can India handle GM Technology? (2003) Gene Campaign, available at: <http://www.genecampaign.org/Publication/Article/GMtech/Can%20India%20Handle%20GM%20Technology.pdf>

<sup>34</sup> Gene Campaign, Government acts against farmers yet again - Proagro's inferior GM Mustard variety to be released soon (2002). Available at: <http://www.genecampaign.org/Publication/Pressrelease/GM%20mustard%20press.pdf>

Genetic Engineering Approval Committee of India not to approve any GM crop for fresh field trials. In 2008, the Supreme Court of India revoked the ban it had earlier placed on the approval of large scale field trials of transgenic crops. It took this decision after balancing the commercial interests, food security and environmental concerns.

#### **4.2 LEGAL AND NON-LEGAL MECHANISMS IN INDIA**

Less than 3% of cropland in India is planted with GM crops, almost exclusively with GM Cotton. In comparison, within the European Union, GM crop cultivation represents a mere 0.21% of agricultural land. With the restrictions imposed in the EU countries, multinational companies are aggressively penetrating in the developing countries, especially India, to develop and commercialise GM crops. For multinational companies, patenting a crop in a foreign country such as India is an expensive endeavour. This requires the field test and other administrative and legislative formalities to be completed in India. There is also an important issue of the marketability of the product. Multinational companies will be interested to apply for patent in a country where the law allows the patent of GM crops.

The case study highlights a number of issues that require further considerations:

- ***Weak domestic legislation:*** According to Gene Campaign, despite two separate public interest litigation (Gene Campaign PIL of 2004, another PIL filed in 2005), the government has still not revised its regulatory framework to comply with the Biosafety Protocol. It challenged the constitutionality of the Rules for the Manufacture, Use, Import, Export and Storage of Hazardous Micro-organisms, Genetically Engineered Organisms or Cells, 1989 framed under the Environment (Protection) Act, 1986. Existing Indian laws dealing with GM crops are inadequate to protect human health and the environment. For example, the Patent (Second Amendment) Act 2002 deals with the GM seeds. Article 3 (i) deals with what is not an invention. The word ‘plants’ have been omitted on this modified definition. This implies that a method or process of modification of a plant can now be counted as invention and can be patented. Section 3(j) of the Act excludes as inventions ‘plants and animals...including seeds, varieties and species and essentially biological processes for production and propagation of plants and animals.’ This provision copies the language found in Article 27.3 (b) of the TRIPS Agreement. There is no

clear definition of the meaning of ‘essentially biological’ and the process of genetic engineering may not be essentially biological.<sup>35</sup> These two provisions have allowed multinational companies such as Monsanto to receive the patent to commercialise GM seed or plant (e.g., Bt. Cotton).

- ***Lack of formal public consultation procedures:*** There is no formal public consultation procedure that deals with GM crops, food or feed. For GM crops, however, the Indian government has initiated public consultations involving activists, academics, NGOs, farmers and consumers. This was due to the fact that NGOs and media were vocal about the commercialisation of GM crops and pressured the government to call for a public consultation. Negative public opinion from these consultations led the government authority to put a ban on the commercialisation of Bt Mustard. Another example is Brinjal, which is a very popular crop with 22% of land under vegetable cultivation being allotted to the crop. Despite fierce opposition from scientists, farmers and campaign groups, the GM crop Bt brinjal was cleared by an Indian government panel for commercial cultivation in October 2009. It was also cleared by the Genetic Engineering Approval Committee. However, the government, after several public consultations across the country, decided not to allow the cultivation of Bt brinjal. It shows that public involvement at an earlier stage of decision making in potentially contentious areas may help to avoid the emergence of conflict.
- ***Lack of precautionary approach (by the host state and the company):*** Risk regulation needs to be fair, effective, accountable and open. At present, the biosafety regulations follow precautionary principle. However, as the GM case study suggests, India having faced a crisis of legitimacy and trust in its regulatory procedures, needs to embrace a more precautionary approach, and with this a more inclusive and participatory approach to the framing and implementing of regulations. Precautionary approach can be taken regarding the facts, data and measurement issues surrounding the risk assessment procedures, broader political, moral and economic questions about the technology in question, and the regulatory procedures pointing to issues of transparency and inclusion in the decision making process.

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<sup>35</sup> V. Shiva *et al*, *Corporate hijack of biodiversity: How WTO-TRIPS Rule Promote Corporate Hijack of People’s Biodiversity and Knowledge* (Navadanya, 2002)



A precautionary approach to environmental protection under the Global Compact suggests that companies (e.g., Unilever, Aventis) need to take early actions to ensure that irreparable environmental damage does not occur because of their practices, instead of waiting until the damage is done. According to the Global Compact, this is more cost-effective and also protects the corporation's public image. Within the EU, where there are reasonable grounds for concern that potential hazards may affect the environment or human, animal or plant health, and when at the same time the lack of scientific information precludes a detailed scientific evaluation, the precautionary principle has been the politically accepted risk management strategy in several fields.<sup>36</sup> European states administer regulatory policies consistent with the precautionary principle; meaning that GM crops must be shown to be safe for the environment and consumption to be sold. The EU has been a global leader in incorporating precautionary approach in its policy making. The regulatory requirements and the negative attitude engendered towards GM crops within the EU led many biotech companies and the agricultural industry to shift their research enterprises outside the EU. Many developing countries, including India, are largely unprepared for this shift. As the GM case study shows, there is a potential breach of Principle 7 (precautionary approach) of Global Compact by Aventis. In addition, the standards followed for testing GM crops, the field trial tests results that were evaluated against these standards and the decision making process were not transparent.

- ***Weak disclosure of information mechanisms:*** It is alleged by Gene Campaign that the government refuses to answer any questions or share any information on GM food crops.<sup>37</sup> When questioned under the Right to Information Act (2005), the government agencies did not readily provide data. The public interest litigation brought by Gene Campaign in 2004 in the Supreme Court asked for a better mechanism to access information on GM crop trials along with a more stringent and technically competent regulatory system that could be relied on to safeguard environmental and health

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<sup>36</sup> European Commission, Communication on Precautionary Principle 2000.

<sup>37</sup> Suman Sahai, India Submits false data on Biosafety in International Negotiations, (2008) Gene Campaign, available at: <http://www.genecampaign.org/Publication/Pressrelease/India%20Submits%20false%20data%20on%20Biosafety-May-8.html>

safety. The government has not made the data on risk assessment and environmental reviews of GM crops available in public. Without any formal procedure to access this information, the Supreme Court directed the Government to make public the data on the allergenicity and toxicity tests conducted on GM food crops.

- **Limited redress and liability:** Litigation is often employed with the aim of enforcing legal rights or responsibilities where they exist. In the GM issue, the Supreme Court of India initially put a ban on the commercialisation of GM crops but revoked the ban in 2009 as the Court prioritised commercial interests. Therefore, the effectiveness of litigation varies and types of outcome that litigation can generate are in many ways limited. With GM crops, there is no law to ensure compensation to farmers that have suffered losses and damage to their soil or their livestock. The issue of genetic pollution, monitoring and liability of companies are not considered under the Patent Act 2002 and it is unclear whether the local farmers can bring an action against the companies if the GM crops contaminate the neighbouring farmer's field. This is a cause for concern as, in Canada, Monsanto brought a legal action for compensation against a farmer whose canola crops were contaminated by Monsanto's Round Up Ready canola. In that case, Monsanto demanded USD 200,000 fine or the theft of intellectual property.
- **Lack of transparency in the formation of decision making body:** The formation of Genetic Engineering Approval Committee is highly contested as it has refused to allow anyone from the public to be a member. At present, the membership includes representatives from various government agencies, central government funded relevant research councils and public sector research institutions. It does not allow any representative from the civil society organisations or private sector. According to Gene Campaign, the Committee set up under the 1989 Rules for the Manufacture, Use, Import, Export and Storage of Hazardous Micro-organisms, Genetically Engineered Organisms or Cells lacks technical competence, transparency and public participation. As the Committee decides whether or not to approve a GM crop for general release and commercialisation, it is important that its composition and procedure is transparent. This lack of transparency led the Gene Campaign to allege that the Genetic Engineering Approval Committee of India colluded with the

company while deciding in favour of the commercialisation of Bt Cotton<sup>38</sup> and GM Mustard.<sup>39</sup>

- **Lack of GM labelling:** There is no provision in place for labelling GM crops in India yet. The UN/FAO Codex Alimentarius Commission's recommendations and the EU directives on mandatory GM-labelling may influence India's laws on labelling. European countries call for a more precautionary approach to risk regulation and labelling requirement needs to be extended to European companies operating in developing countries.

## 5. CONCLUDING REMARKS

- a. The **first issue** is that the **regulatory weaknesses in the host state** fail to prevent or minimise negative human rights and environmental impacts of European companies.

The cases studies show that the subsidiaries operating in India follow the host state's law. These companies are member of either the Global Compact (Aventis, part 4) or the OECD Guidelines for Multinational Enterprises (Vedanta, part 2) or both (Unilever, part 3). They all have their own company policies or Codes of Conduct that integrate environmental and human rights issues. However, these market oriented policies do not include mandatory requirements to report any human rights or environmental abuse to the home state. The home state, as part of its international human rights obligations, needs to ensure that companies put in place mechanisms to investigate the risks of human rights and environmental abuses and take all reasonable steps to prevent or mitigate the abuses irrespective of their location of business.

The case studies highlight several regulatory gaps in the host state, both at the substantive and procedural level. For example, inadequate laws on GM crops (part 4), weak liability and redress mechanisms, and lack of labelling procedure mean India is not well prepared for multinational companies wanting to commercialise GM crops in India. Regulatory gaps

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<sup>38</sup> P. Newell, *Biotech Firms, Biotech Politics: Negotiating GMOs in India* (2007) *The Journal of Environment Development*, 16, 183, at 197.

<sup>39</sup> Gene Campaign, *Press Release: GM Mustard: NGOs Appeal to CVC to examine corruption and irregularities in India, s scientific and regulatory agencies, GEAC in particular* (11 November 2002)

allowed Unilever (part 3) to practice double standard as mercury can be handled more cheaply in a developing country without the stringent rules protecting workers that exist in Europe.

The case studies also show that regulatory tools, such as consultation, disclosure requirement and access to information, are inadequate to make the government agencies and the companies more accountable in the host state. All three cases studies highlight that there is lack of consultation by the government agencies (part 2) and by the company (part 2, 3, 4). It is immensely difficult for local communities to access information in the host state. In the absence of full information disclosure, access to court remains an ineffective option. For example, the tribal groups in Orissa (Dongria Kondh) were not informed of the environmental impact assessment and not aware of the full extent of the mining project (part 2). For the GM crop (part 4), results of field tests were not made publicly available. Both the Genetic Engineering Approval Committee of India and the company refused to make any information publicly available. For the mercury pollution (part 3), while some information on mercury contamination is available from the Unilever and Hindustan Unilever websites - this information contradicts the information found in NGO websites (e.g., Greenpeace India). It is possible for the EU Member States to establish procedures so that companies apply the EU standards of information disclosure.

European civil society organisations (Survival International in part 2, Greenpeace in part 3) played a significant role in publicising the corporate abuse and accessing non-judicial mechanisms such as the National Contact Points of the OECD Guidelines. In addition, the shareholders can play an important role in making the company work in an ethical manner. For example, following a study by their Ethics Council, the Norwegian Government's pension fund sold shares worth US\$13.2 million in Vedanta Resources Plc due to environmental and human rights failures (part 2). Other major shareholders of Vedanta Resources Plc such as the Church of England, Edinburgh-based investment broker Martin Currie have withdrawn their holdings because of the environmental and ethical concerns. While the shareholders own shares, they do not own the publicly held corporation and cannot directly control the actions of the business. However, even with an indirect control over the actions of the corporations, shareholders can give out an important and significant message to company regarding their unsustainable practices.

The paper shows that voluntary code of conduct or self regulation is inadequate to prevent corporate abuse so are the international voluntary mechanisms. The issue of extraterritorial laws remain contested within the EU as it raised complex questions of jurisdiction, law and national priorities. However, it is possible to use extraterritorial model where, for example, there is a clear nexus between parent and the subsidiary (as in part 2) or it is about the application of home state national law if it integrates international human rights obligations. Within the EU, it is time to think about whether some of the existing laws can assist victims of corporate abuse in the host state. For example, the case studies on mining (part 2) and GM crops (part 3) highlight a lack of formal public consultation mechanism. The EU and the member states are already applying regulatory standards imposed by the 1998 Aarhus Convention<sup>40</sup> which can be broadened to include companies operating outside the EU. For the disclosure of information, one example can be the UNECE PRTR Protocol to the Aarhus Convention.<sup>41</sup> The case study on the mercury pollution (part 3) shows the weakness in Indian laws to apply precautionary approach. It would be interesting to see whether risk regulation in the EU dealing with chemicals produced by industry and assessing their potential to cause harm to the environment or public health can be extended to companies operating outside the EU. The case study on GM crops (part 4) shows that Indian regulations do not require labelling on GM products. One option is for India to formulate labelling law. Another option can be if the home state law, through parent company, prescribes the criteria and verification process for labelling to be followed by the company growing and commercialising GM crops in a developing country.

b. The **second issue** is the **availability and access to remedies in the host state**.

Regarding availability of effective remedies in the host state, the case studies show (part 2, 3, 4) that the communities and NGOs in India can bring public interest litigation and challenge any activity by the multinational company. Public interest litigation is a recognised legal mechanism for the enforcement of constitutionally guaranteed rights involving questions relating to public interest. It is a form of legal proceeding in which redress is sought in respect of injury to the public in general and where there may be no direct specific injury to

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<sup>40</sup> 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, entered into force in 2001).

<sup>41</sup> 2003 Protocol on Pollutant Release and Transfer Registers (PRTR Protocol) states that certain information is made publically available regardless of specific requests and implies a kind of right to know. As with the Aarhus Convention, any UN member can be a party to this Protocol. Entered into force in 2009.

any individual member of the public. It is, however, clear from the history of the development of public interest litigation that the lack of adequate remedies from the government agencies forced the people to bring legal action in the court. As the case study on mercury pollution (part 3) shows, other options (e.g., criminal case, tort litigation) are underdeveloped in India. The public interest litigation process, however, could be lengthy and time consuming (as in part 4). It is expected that the recently formulated Green Bench will help to shorten the lengthy procedure. Apart from formal litigation, it is also possible for the communities to make a complaint to the relevant government agencies (e.g., Pollution Control Board in part 3) or to the National Human Rights Commission. The Human Rights Commission has very weak legal powers and is not able to enforce any recommendation.

The case studies show that there are some evidence of collaboration of European corporations with public bodies to provide some remedies in the host state. For example, Vedanta's website shows that the company is working with the Government of Orissa to assist the communities likely to be affected by the mining project (part 2). According to the website of Unilever, Hindustan Unilever is assisting the Tamil Nadu Pollution Control Board in the remediation and clean-up process (part 3). On the other hand, the companies were not as keen to cooperative with the NGOs. As the UK NCP Report shows, Vedanta initially did not want to be part of the UK NCP process. They refuted all allegations and used Indian media to highlight that UK NCP is a foreign agency meddling in Indian internal matter. In its response to the UK NCP Final Statement, Survival International alleged that Vedanta tried to stop the NGO from entering in the project area in Niyamgiri hills. The Greenpeace alleged that the company failed to disclose information to the workers on the adverse effect of mercury pollution – that caused delay in bringing the case in the court.

What about access to remedies in the EU? At the EU level, EU citizens have limited access to the Court of Justice of the European Union and there is no access of victims of corporate abuse occurred outside the EU. At the national level (home state), standing of these victims is restricted as there is the technical difficulty to prove the nexus between the parent and the subsidiary (part 2), and there are additional issues of evidence, limitation period, funding and legal aid.<sup>42</sup> The National Contact Points of the OECD Guidelines for Multinational Enterprises could be an avenue for local communities or NGOs to submit their petitions in

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<sup>42</sup> Joint Parliamentary Committee, List of Written Evidence (June 2009), available at: <http://www.parliament.uk/documents/upload/BHRevidence210509.pdf>

the home state. As seen in the mining case study (part 2), the UK NCP was highly critical of the way the local level consultation was conducted by the company. It also acknowledged the constraints of the national courts as the issue of lack of consultation was not considered by the Supreme Court of India. There is, however, no penalty or sanction imposed. This case study further shows that Vedanta disagrees with the Final Statement and affirms that they are complying with Indian law. For the mercury pollution case study (part 3), apart from suggesting the breach of the principles of Global Compact, Greenpeace did not make a formal complaint to Global Compact. For Global Compact, the absence of any mechanism to monitor or impose penalty makes it an ineffective tool to improve corporate practices.

Noting that the decisions of the National Contact Points of the OECD Guidelines are non-binding and do not provide any remedy to victims, there is a need to strengthen judicial remedy at the home state. With existing problems of forum non-conveniens, limited liability, separate legal personality of companies and enforcement of judgements, it is difficult to provide access to remedy for victims of corporate abuse in the home state. One option is to relax the standing, funding and legal aid criteria that will allow victims of corporate abuse to bring their action in the home state. If the technical difficulty to prove the nexus between parent and subsidiary is eliminated with the parent company having control over the conduct of its overseas subsidiaries, that will assist victims to bring claims in the home state. For the host state, India has national laws, government agencies and the judiciary to deal with companies abusing human and environmental rights. Apart from legal barriers such as lack of implementation of domestic laws, there are also practical and financial barriers for victims to access judicial remedies. In India, public bodies need to consult with the civil society and the private sector to enact law where there is none (e.g., labelling, risk regulation), strengthen weak laws (e.g. tort laws, criminal laws), develop regulatory standards and benchmarks, and improve the compliance of existing domestic laws (e.g., human rights law, environmental law). It is also possible for the home state to work with India (host state) in order to strengthen host state's capacity to regulate business behaviour effectively.

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