SURVIVAL INTERNATIONAL

Business and Human Rights

Evidence to the JCHR

30 April 2009

British companies on tribal land

1. Vedanta Resources plc is a FTSE 100 mining conglomerate, listed on the LSE with its registered office in this country. It is about to construct an open pit mine in Orissa, India which will blast 73 million tonnes of bauxite from Niyam Dongar, the most sacred site of the Dongria Kondh. The streams and cultivated land on which the tribe depends for its livelihood will be polluted by air-borne particulates from the mine, conveyor and access roads. A timber mafia has already begun to use these roads to invade Dongria forests and orchards. For months now, in a last ditch effort to protect their way of life, the Dongria and their supporters have organised road blocks, mass protests and other demonstrations against the mine.[1] Many believe that the tribe will not survive if Vedanta proceeds with its plans.

2. In December 2008 we filed a complaint against the company for breaches of the OECD Guidelines for Multinational Corporations. We would welcome an opportunity to give oral testimony about the complaint and how it has been handled. In summary we have alleged that Vedanta has persistently failed to respect the rights of the Dongria Kondh under international human rights law - particularly their rights to enjoy their own culture and religion, to equality before the law, and not to be deprived of their means of subsistence. We have also identified repeated violations of the Dongria's right to be consulted about the project under the Convention on Biological Diversity, the Race Convention and the UN Declaration on the Rights of Indigenous Peoples.

[1] For details see http://www.survival-international.org/news/4152 In a recent altercation, Dongria tribesmen apparently resorted to violence to repel Vedanta personnel from Niyam Dongar. Local tensions continue to increase.

3. Notwithstanding claims by Vedanta that the complaint represents a "deeply disturbing interference in the internal affairs of India," and "shows contempt" for the Indian Supreme Court which has received petitions about the mine, the DBERR has recently decided that the complaint is admissible. An investigation is now under way.[2]

4. We have also drawn the attention of Vedanta Directors to their duty under section 172 of the Companies Act 2006 to "have regard to the impact of the company's operations on the community and the environment, [and to] the desirability of the company maintaining a reputation for high standards of business conduct". We have reminded them that Section 417 requires the company to inform shareholders in its 2009 Business Review that an adverse finding under the OECD procedures might harm its reputation; and of the significant costs that the company can expect to incur to protect its property and personnel against the protests to which we have referred.

5. Another group with which we are closely involved are the Kalahari Bushmen, whom we helped win a landmark case in the Botswana High Court against their eviction from the Kalahari Desert. In December 2006 the Court ordered that they should be allowed to return to their settlements. As and when world markets recover, however, a diamond mine will almost certainly be built on their territory and will bring new threats for the Bushmen. Unless Gem Diamonds Ltd - another LSE listed FTSE 100 company in which the mining rights are vested - can be persuaded to enter an impact and benefits agreement with the affected communities, they may be forced from their homes again.

6. In other sectors the problems are of a different order but are no less acute. Most recently we have crossed swords with a television production company, also British, which trespassed on tribal lands in South America to make a reality TV programme. The film crew unwittingly brought disease with them, and are said to have left several Indians dead in their wake.[3]

[2] The complaint can be accessed at www.oecdwatch.org/cases/Case_165/753/at_download/file . The initial assessment by the DBERR is at http://www.berr.gov.uk/nationalcontactpoint. For the background, see www.survival-international.org/tribes/dongria

[3] See http://www.survival-international.org/news/3166 for details.

No effective control

7. There is no doubt that British companies frequently exert an enormous impact on indigenous peoples in developing countries, and that their activities escape effective regulation in both the host country and the United Kingdom.[4]

8. In the host country, governments often fail to enact the domestic legislation required to give effect to the human rights covenants they have ratified. Even if the legislation is in place there may be no independent judiciary to enforce it, and indigenous communities almost always lack the financial or human resources to litigate.

9. In the United Kingdom, many organisations at least make the right noises. New codes of conduct and human rights policies appear almost daily.[5] The Equator Principles call on companies to "respect and preserve the culture, knowledge and practices of Indigenous Peoples". The International Council on Mining and Metals has committed its members, many of whom are major British companies, to "respect the rights and interests of indigenous peoples under international human rights laws." Rio Tinto has agreed not to mine on aboriginal land without the consent of the community, even if this "may sometimes result in our not exploring land or developing operations when legally permitted to do so." The bank that advised Vedanta on its stock exchange listing, JP Morgan Chase, is one of several which have pledged not to fund projects on tribal lands unless they are preceded by a "free, prior and informed consultation" of the affected groups.

10. These are encouraging developments, but most voluntary codes offer no effective redress if things go wrong; and the companies most likely to violate indigenous rights are the least likely to subscribe to a code in the first place.[6] Vedanta may incur reputational damage if the OECD finds against it, but the company cannot be compelled to put right the damage it has done, or even to adjust its future conduct. Nor is there any obvious way of bringing to book a company or its directors for breaches of sections 172 or 417 (which may explain why the Vedanta board has not troubled to reply to our letters on the subject).

---

[4] By "indigenous peoples" we mean people characterised by a close attachment to ancestral territories, self-identification as members of a distinct indigenous group, and a subsistence-oriented production.

[5] See http://www.business-humanrights.org/Documents/Policies

[6] Vedanta, for example, is not a member of the IMCC. Nor is Gem Diamonds.

11. The UK Government also makes the right noises. It voted for the UN Declaration on the Rights of Indigenous Peoples, and accepts that these peoples "have suffered many historic injustices and continue to be amongst the poorest and most marginalised peoples of the world." It has yet to introduce any practical measures, however, to ensure that British companies do not add to these injustices.

12. One of the Business Principles of the ECGD, for example, is that it "will ensure that our activities take into account the Government's international policies, including those on sustainable development [and] human rights"; but no sanction is available if the recipient of an export credit guarantee operates on indigenous land without prior consent.

13. In theory an indigenous community might sue an English company here for a negligent act or omission abroad. Negligence in remote areas may be difficult to establish, however, and it can be even more problematic to prove that it is the actions of the English parent that have driven its local subsidiary. Cases could take years to come to trial.

<u>The way forward</u>

14. If real progress is to be made new means must be found to hold British companies liable in this country for the violation of indigenous rights abroad. Professor Ruggie has himself referred with apparent approval to the "increasing encouragement at the international level, including from the treaty bodies, for home States to take regulatory action to prevent abuse by their companies overseas." Interestingly the example he gives is a request made by the UN Committee on the Elimination of Racial Discrimination to Canada, to "take appropriate legislative or administrative measures to prevent adverse impacts on the rights of indigenous peoples in other countries from the activities of transnational corporations registered there."

15. What sort of measures might the UK introduce? It could and should follow the lead of the Dutch Parliament which in 2001 approved proposals to enable financial assistance to be withdrawn from companies which fail to comply with the OECD Guidelines. The UK ought also to consider whether to remodel its national contact point along Dutch lines, so as to encourage a more obviously independent investigation of complaints. It should often be possible, and desirable, for the NCP to hold public hearings.

16. In France, listed companies are required by law to report on the compliance of their foreign subsidiaries with "fundamental" ILO conventions. A similar provision could easily be introduced here, especially for ILO Convention 169 on Tribal and Indigenous Populations. Shareholders are entitled to know whether and how their companies respect the rights of the indigenous communities with which they come into contact. They ought especially to be able to satisfy themselves that the company has not undermined indigenous rights to "ownership and possession of the lands which they traditionally occupy" [Article 14(1)], and "to be consulted with a view to ascertaining whether and to what degree their interests would be prejudiced, before any programmes are undertaken for the exploration or exploitation of mineral resources pertaining to their lands" [Article 15(2)].

17. The Environmental Information Regulations 2004 already recognise the public's right to environmental information, and do not confine the right to information about activities with an environmental impact in the UK. But the Regulations would be more effective if British companies were required to deposit with a public authority in this country impact assessments of projects of which they or their subsidiaries were the proponent and which were likely to affect indigenous peoples.

18. Social and environmental impact assessments are now a standard requirement in some developing countries, if only to appease the IFIs. They vary hugely in quality but can contain valuable material not readily accessible elsewhere. Rarely, however, are they made available to the indigenous peoples whose homes or livelihood may be directly under threat. Even if they are, illiteracy rates in many communities remain high. If NGOs like Survival were able to obtain these assessments here, they could explain their significance to the communities in a language and a form they could readily understand. (Indigenous people may not be able to read but they can use mobile phones).

19. Without prior access to the impact assessment, any "consultation" of the community about the project is likely to prove an empty charade. With it, community leaders should find it much easier to negotiate with project proponents.

20. These are all modest proposals. We believe that the UK should go further and ratify Convention 169, as the European Parliament has urged all member states to do. The Government has so far declined, ostensibly on the ground that there are no indigenous peoples in this country.

21. This has not stopped Spain and the Netherlands, both of which have recently ratified the Convention to ensure compliance with its provisions by Spanish and Dutch companies working in indigenous areas. Ratification would fully accord with the views of the IFC, which has pointed out that

> "If an IFC client is implementing a project where government's actions mean that the project does not meet the requirements of the Convention, it can find itself accused of "breaching" its principles or of violating rights that it protects. This has occurred in relation to several IFC-financed projects in Latin America, and such complaints have sometimes contributed to troubled community relations and project delays. The implementation of the Convention in the context of private sector projects (directly by governments or indirectly by private companies) will support a more open and inclusive approach to private investment. In this way, the private sector also benefits from government ratification and adherence to the Convention."

22. A short enabling Act could require British companies to "respect" the rights of indigenous peoples laid down by the Convention, and give them a cause of action here for a breach of the statutory duty. If necessary the court would assume jurisdiction only if it was first satisfied that the claimants were unable to obtain adequate relief in their own country. With or without this restriction, litigation in the UK would be a rare event. The mere possibility of a claim, however, would again strengthen the hand of community leaders in their attempts to resolve disputes with multinationals.

23. Alternatively an independent commission should be created to investigate allegations of corporate abuse. The statute by which it is formed should require British companies to take reasonable steps to identify and avoid any abuse of indigenous rights within their sphere of responsibility. In most instances this will require a company to commission an indigenous peoples impact assessment before a project is approved. As Professor Ruggie has observed

> "Many corporate human rights issues arise because companies fail to consider the potential implications of their activities before they begin. Companies must take proactive steps to understand how existing and proposed activities may affect human rights ... While these assessments can be linked with other processes like risk assessments or environmental and social impact assessments, they should include explicit references to internationally recognized human rights. Based on the information uncovered, companies should refine their plans to address and avoid potential negative human rights impacts on an ongoing basis."[7]

24. It is essential that the "internationally recognized human rights" which the company is required to respect should specifically include the right of indigenous peoples to their traditional lands, and their right not to be removed from them without their prior informed consent. These rights are unique to indigenous peoples, reflecting the unique relationship that they bear to their land and territories. Unless their consent is obtained at all stages of the project lifecycle, indigenous peoples will be effectively denied their more conventional human rights as individuals.

25. Affected communities can only consent to a project if they are informed about its nature, duration and impact in a culturally appropriate manner. Anthropological or other expert evidence may be required to determine what is appropriate in any particular case, and the commission would need to have the power to call for such evidence where it was required. Provision would also have to be made to meet the costs incurred by indigenous communities in making representations to the commission.

Conclusion

26. The particular rights of indigenous peoples are now well established in international law. Over the last few years many companies have come to recognise that it is in their own best interests to recognise and respect those rights. They know that if they fail to do so they risk significant delays, reputational damage and hugely increased security costs, as well as the prospect in some cases of future litigation. These risks can only increase as indigenous groups become better organised (or, depending on your point of view, more militant).

[7] Protect, Respect and Remedy: A Framework for Business and Human Rights [A/HRC/8/5] §61

27. There remain companies, however, that cling to the view that their investors are concerned solely with profits, and that they can safely rely upon their superiority of arms to defeat any indigenous community that confronts them. They know that local laws will not usually be allowed to stand in their way. They think they know that UK laws cannot deter them either. We hope that the JCHR can take effective steps to disabuse them of this notion.