

Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

REFERENCE: AL
OTH 8/2016:

12 February 2016

Dear Mr. Sang-Hyun Kim,

We have the honour to address you in our capacities as Chairperson of the Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; and Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health pursuant to Human Rights Council resolutions 26/22, 27/23, and 24/6.

In this connection, we would like to bring to your attention information we have received concerning **alleged violations of the rights of at least 530 individuals that have suffered from adverse health impacts due to exposure to hazardous chemicals found in humidifier sterilizers as well as the alleged victims yet to be identified.**

According to the information received:

Background

Each year from 2006 to 2011, especially from February to June, several individuals were admitted to hospitals for respiratory failure, acute pneumonia, and other unknown lung disease, for causes which were not identified at the time. In April 2011, Seoul Asan Hospital alerted the Korea Center for Disease Control and Prevention (KCDCP) emphasizing the irregular phenomena observed - seven individuals were consecutively admitted as patients with an unknown respiratory disease. Subsequently, KCDCP, under the auspices of the Ministry of Health and Welfare, carried out an epidemiological study and conducted animal tests from April 2011 to February 2012 and found humidifier sterilizers to be the presumed cause of the respiratory disease and other health impacts.

According to the two investigations carried out by KCDCP (from July 2013 to April 2014) and the Ministry of Environment (from July 2014 to April 2015), as of December 2015, of 530 cases evaluated 142 individuals had deceased and a total of 221 individuals were identified as victims suffering from health impacts as a result of exposure to humidifier sterilizers. Many of the deceased and other victims identified thus far were women in the post-natal period and young children, including new born babies. It is reported that the Government is currently carrying out a third investigation to identify additional victims.

The Government has identified those victims based on the causal relationship between the exposure to humidifier sterilizers and the respiratory health impacts caused by humidifier sterilizers. It is reported that evidence such as left over sterilizer and documents or pictures that would prove usage of sterilizers had been used as the basis for the classification.

The Government grouped alleged victims into five categories: “very likely”, “probably”, “possibly”, “unlikely” and “not able to judge.” Those individuals who fell into “very likely” and “probably” categories were recognized by the Government as victims and received compensation for medical and funeral expenses. It is reported that 155 victims were categorized as “very likely” and 62 as “probably” out of the 530 cases evaluated. Individuals belonging to the “possible” and “unlikely” categories are currently under Government health monitoring. Individuals, and those that died without leaving behind any medical record, were categorized into the “not able to judge” category and have not received any compensation or other remedy.

It is reported that a large number of residents living in the Republic of Korea consider humidifiers to be a daily necessity and use them in order to create a healthier environment in their homes and workplace. Humidifiers were first introduced on the market in 1994 in the Republic of Korea and according to the National Statistic Office report of 2014, in 2011, approximately 6,530,000 humidifiers were used, which represented usage in 33 per cent of households. From the late 1990’s until the mandatory recall in 2011, around 20 different types of sterilizers were manufactured and sold in supermarkets, pharmacies and on the Internet for an average price of KRW 4,000 (USD 4.00).

To prevent germs or mould in the water of humidifier tanks, residents used “humidifier sterilizers,” a liquid or tablet-type chemical mixture. The humidifier sterilizers were composed of several substances and the four substances that have been identified as hazardous are (1) PHMG (Polyhexamethyleneguanidine (phosphate)), (2) PGH (Poly(2-(2-ethoxy)ethoxyethyl guanidium hydrochloride)), (3) CMIT (5-Chloro-2-methyl-3(2H)-isothiazolone) and (4) MIT (2-Methyl-3(2H)-isothiazolone).

It is reported that the four hazardous chemicals were initially reviewed for their usage in carpets and rubbers but no additional review was necessary when those chemicals were used as components of humidifiers sterilizers, which eventually

were inhaled by individuals. The legislation at the time did not require the individual substances or chemical mixture to be re-assessed for relevant hazards and the inhalation risks before being used as a humidifier sterilizer. No information has been received regarding the specific time of this change or other changes that may have been made to the composition of humidifier sterilizers between their introduction and removal from the market in 2011.

In 2001, Reckitt Benckiser, a UK-based corporation, acquired Oxy Co Ltd, a company based in the Republic of Korea, which manufactured and sold its signature steriliser product called “OxySakSak” since 1998. “OxySakSak” held up to 80 per cent of the market share of humidifier sterilizers in the Republic of Korea. Oxy Reckitt Benckiser voluntarily recalled its sterilizer product from the market three months prior to the official recall announcement by the Government.

In March 2014, Oxy Reckitt Benckiser donated around USD 4.4 million to be dispersed to the victims through the Ministry of Environment. It is alleged that the alleged victims refused to accept the funds unless an official apology was made. In May 2015, several victims and family members visited the Reckitt Benckiser headquarters in London. Allegedly, the representatives of Oxy Reckitt Benckiser responded to the alleged victims and their families that it is not in the position to provide any comment due to the ongoing litigation. The Special Rapporteur on hazardous substances and waste, Mr. Baskut Tuncak, also met with the representatives in October 2015 and heard a similar response.

Several large retailers such as E-mart Co. Ltd. (“E-Plus” humidifier sterilizer), GS Retail Co. Ltd. (“Hambakusseom” humidifier sterilizer), Lotte Shopping Co. Ltd. (“Wiselect” humidifier sterilier), Home Plus Co. Ltd., (“Homeplus” humidifier sterilizer), Butterfly Effect Co., Ltd. (“Cepu” humidifier sterilizer) and Costco Wholesale Korea (“Humidifier” clean-up) also produced and sold their own brand of sterilizers. Home Plus Co. Ltd. is a Korean discount store retail chain wholly owned by Tesco PLC, a multinational retailer headquartered in Hertfordshire, England. Costco Wholesale Korea is a subsidiary of Costco Wholesale Corporation headquartered in Washington, United States.

Chemical manufacturers who sold ingredients used as sterilizers include Hanvit Chemical Co. Ltd, SK Chemicals, Aekyung Co. Ltd, and Pyuandco Co. Ltd. According to the copy of Material Safety Data Sheet of SK Chemicals dated January 2011, the chemical mixture named “SKYBIO 1125,” which contains a minimum 25 per cent of PHMG, is identified as hazardous. The Material Safety Data Sheet includes a warning that SKYBIO 1125 should not be consumed or inhaled when using.

No information has been received regarding the risk assessment of the chemical components of humidifier sterilizers carried out by the relevant companies before humidifier sterilizers were put on the market.

The alleged victims and the family members filed both civil and criminal charges against manufacturers and retailers of humidifier sterilizers. It is reported that several civil cases have been settled. In response to the first criminal charges filed in August 2012 against ten companies (2012 hyung No. 78863), the prosecution was suspended as the court case could not commence until the Government's own investigation was finalized. Subsequently, a second criminal charge was filed in August 2014 against fourteen manufacturers (2014 hyung No. 77598). It is alleged that the police notified the applicants, without specific details, that certain companies are not subject to indictment. Most recently, on 26 November 2015, a third criminal charge was filed.

Government action

On 11 November 2011, the Ministry of Health and Welfare announced the mandatory recall of six humidifier sterilizers whose components included PGH and PHMG and subsequently in December 2011, Korea Food and Drug Administration (KFDA) re-classified the humidifier sterilizer as a sanitary aid requiring a pre-authorization before they can be placed on the market. On 23 July 2012, the Korean Fair Trade Commission found four companies – Oxy Reckitt Benckiser, Home Plus Co. Ltd., Butterfly Effect Co., Ltd. and Atoorganic - guilty of falsely advertising their sterilizer products as “safe to humans” and fined the companies.

In 2014, the Ministry of Environment provided medical and funeral expenses to the victims in accordance with article 12(2) of the enforcement ordinance of the Environmental Health Act. The financial support was only provided to those victims that fell into the “very likely” and “probably” categories among the five categories mentioned above. In order to indemnify the budget that has been dispersed, the Government filed an indemnity claim lawsuit against the companies involved in the humidifier sterilizer case (Seoul Central District Court (2014gahap588147)).

In addition, alleged victims and their family members have filed a civil lawsuit against the Government for compensation arguing that the Government is liable for the injuries caused by the omissions of the civil servants. The Seoul Central District Court found that the Government did not violate its duty of care referring to the constantly changing standards and studies related to hazardous substances and held that the standard of the technology and the social awareness at the time should be the standard applied to assess whether the Government's response and measures were sufficient (2012gahap4515).

We express grave concern that the alleged victims who have either died or continue to suffer from health impacts and emotional distress as a result of using humidifier sterilizers have not yet received an adequate remedy, which includes, among other elements, adequate compensation for the physical harm and moral damage suffered, a meaningful public apology, commemoration or tribute to the victims, costs required for

legal or expert assistance, and guarantees of non-repetition including preventive measures.

We further express grave concern regarding the Government's criteria to identify victims classifying them into five categories based on limited types of evidence. We raise concern that the classification defined by the Government inevitably results in identifying a limited number of victims, which risks excluding a large number of other victims from being eligible for financial support and health monitoring. In addition, we note with concern that the scope of impact of the sterilizer product is not yet confirmed and also that there may be a large number of unaccounted victims that have died, suffered or continue to suffer without the knowledge that their usage of a humidifier sterilizer may be the cause for their sufferings.

Moreover, we express concern regarding the domestic application of international human rights treaties in relation to the Seoul Central District Court's decision, in particular, ascertaining the obligation of the Government to protect all persons from acts of private parties that impair the enjoyment of human rights in domestic court decisions. In this regard, we emphasize that the judicial enforcement of human rights is fundamental. Additionally, we note with concern the delays in commencing investigation and relevant action by the Government in relation to the three criminal charges filed against several companies implicated.

Finally, we express concern that business entities involved in the production and distribution of humidifier sterilisers may not have exercised adequate due diligence to prevent human rights harms arising from the usage of humidifier sterilisers.

We have written to the Government of the Republic of Korea as well as other business entities mentioned in this letter to express our concerns about, and to request more information on, the allegations described above.

In connection with the above alleged facts and concerns, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please provide information on any investigations that have been carried out in relation to the humidifier steriliser case including information, where available, on any inquiries carried out, and on their results.
3. Has your company received any guidance from the Government of the Republic of Korea on its corporate responsibility to respect human rights, specifically on its expected due diligence process, in line with the UN Guiding Principles on Business and Human Rights?

4. How is your company meeting its responsibility to respect human rights in a way that complies with international human rights standards? Does it have a policy commitment (approved at the most senior level of the company) that is reflected in its operational policies and procedures?
5. Please explain what your company is doing to carry out its human rights due diligence in order to identify, prevent, mitigate and account for how it addresses adverse human rights impacts such as those referred in this letter. How does the company track the effectiveness of its measures to prevent and mitigate adverse human rights impacts, including through consultation with affected stakeholders?
6. What operational-level grievance mechanisms has your company established or participated in, to address the grievances identified above and remediate them directly?

We would appreciate receiving a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please note that this letter together with your response will be made available in a public report to be presented to the Human Rights Council for its consideration.

Sincerely,

Dante Pesce

Chairperson of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Baskut Tuncak

Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes

Dainius Puras

Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to take this opportunity to draw your attention to applicable international human rights norms and standards, as well as authoritative guidance on their interpretation. These include:

- The Universal Declaration of Human Rights (UDHR);
- The UN Guiding Principles on Business and Human Rights;
- The UN Global Compact principles;
- The International Covenant on Economic, Social and Cultural Rights;
- The International Covenant on Civil and Political Rights; and
- The United Nations Declaration on Human Rights Defenders.

In particular, we would like to remind you that a private actor and business enterprise has certain responsibilities as outlined in the Guiding Principles on Business and Human Rights. The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. Furthermore, it exists over and above compliance with national laws and regulations protecting human rights.

The UDHR proclaims that every organ of society shall strive to promote respect for human rights and fundamental freedoms and to secure their universal and effective recognition and observance. The UDHR (article 3) and the International Covenant on Civil and Political Rights (article 6.1) also guarantee the right of every individual to life and security and not to be arbitrarily deprived of life.

Following years of consultations that involved Governments, civil society and the business community, the Human Rights Council unanimously adopted in June 2011 the Guiding Principles on Business and Human Rights (contained in A/HRC/17/31).

The Guiding Principles have been established as the authoritative global standard for all States and business enterprises with regard to preventing and addressing adverse business-related human rights impacts. These Guiding Principles are grounded in recognition of:

1. "States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;

2. "The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;

3. "The need for rights and obligations to be matched to appropriate and effective remedies when breached."

The corporate responsibility to respect human rights covers the full range of rights listed in the UDHR, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. It also includes the respect of the eight International Labour Organization core conventions, also envisaged in Principle 4 of the UN Global Compact, which states that business enterprises should uphold the elimination of all forms of forced and compulsory labour. The Guiding Principles 11 to 24 and 29 to 31 provide guidance to business enterprises on how to meet their responsibility to respect human rights and to provide for remedies when they have caused or contributed to adverse impacts.

Business enterprises are expected to carry out human rights due diligence in order to identify, prevent, mitigate and account for how they address their impacts on human rights. Where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. Similarly, where a business enterprise contributes, or may contribute, to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Furthermore, business enterprises should remedy any actual adverse impact that it causes or contributes to. Remedies can take a variety of forms and may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.

The Guiding Principles recognize the important and valuable role played by independent civil society organizations and human rights defenders. In particular, Principle 18 underlines the essential role of civil society and human rights defenders in helping to identify potential adverse business-related human rights impacts. The commentary to Principle 26 underlines how States, in order to ensure access to remedy, should make sure that the legitimate activities of human rights defenders are not obstructed.

The Guiding Principles require that “business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and] (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts” (Guiding Principle 13). This dual-requirement is further elaborated by the requirement that the business enterprise put in place:

1. A policy commitment to meet their responsibility to respect human rights;
2. A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights. The business enterprise should communicate how impacts are addressed; and

3. Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute (Guiding Principle 15).

Each of these is elaborated below.

Policy Commitment:

The first of these requirements, a policy commitment, must be approved by the company's senior management, be informed by human rights expertise (internal or external) and stipulate the human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services. The statement of policy must be publicly available and communicated internally and externally and reflected in operational policies and procedures necessary to embed it throughout the business enterprise (Guiding Principle 16).

Human Rights Due Diligence:

The second major feature of the responsibility to respect is human rights due-diligence, the procedures for which have been deemed necessary to 'identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships' (Guiding Principle 18). Adequate human rights due diligence procedures must include 'meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation' (Guiding Principle 18).

To prevent and mitigate against adverse human rights impacts, the findings of the human rights impact assessment should be effectively integrated across the relevant internal functions and processes of a company. (Guiding Principle 19). Responsibility for addressing such impacts should be assigned to the appropriate level and function within the business enterprise, and internal decision-making, budget allocations and oversight processes should enable effective responses to such impacts.

Any response by a company to address its adverse human rights impacts should be tracked to ensure that it is effective. Tracking should be based on appropriate qualitative and quantitative indicators, and drawing on feedback from internal and external sources including affected stakeholders (Guiding Principle 20). In addition, information about activities taken to address any adverse human rights impacts, and how effective those actions have been, should be communicated externally (Guiding Principle 21).

Remediation:

The Guiding Principles acknowledge that "even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent". Where a company identifies that it has "caused or contributed to adverse impacts" it "should provide for or cooperate in their remediation through legitimate processes" (Guiding Principle 22).

Business enterprises should establish or participate in operational-level grievance mechanisms “to make it possible for grievances to be addressed early and remediated directly” (Guiding Principle 29). Operational-level grievance mechanisms should reflect eight criteria to ensure their effectiveness in practice, as outlined in Guiding Principle 31: (a) Legitimate, (b) Accessible, (c) Predictable, (d) Equitable, (e) Transparent, (f) Rights-compatible, (g) A source of continuous learning, and (h) Based on engagement and dialogue.

Lastly, operational-level grievance mechanisms must not be used to undermine the role of legitimate trade unions in addressing labour-related disputes, nor to preclude access by individuals and communities to judicial or other non-judicial grievance mechanisms (Guiding Principle 29).