

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

REFERENCE:
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15 March 2019

Mr. Mata,

I have the honour to address you in my capacity as Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, pursuant to Human Rights Council resolution 36/15.

I am sending this letter under the communications procedure of the Special Procedures of the United Nations Human Rights Council to seek clarification on information I have received.¹ Special Procedures mechanisms can intervene directly with Governments and other stakeholders (non-state actors) on allegations of abuses of human rights that come within their mandates by means of letters, which include urgent appeals, allegation letters, and other communications. The intervention may relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process involves sending a letter to the concerned actors identifying the facts of the allegation, applicable international human rights norms and standards, the concerns and questions of the mandate-holder(s), and a request for follow-up action. Communications may deal with individual cases, general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of draft or existing legislation, policy or practice considered not to be fully compatible with international human rights standards.

In this connection, I would like to bring to the attention of your company information received concerning **exposure of residents of the Commonwealth of Puerto Rico to toxic chemicals resulting from the disposal of coal combustion residuals**.

According to the information received:

AES Puerto Rico, L.P. (**AES**), incorporated in 1994, a subsidiary of The AES Corporation (**AES Corp**), owns and operates a coal-fired power plant in the municipality of Guayama, Puerto Rico. In November 2002, AES inaugurated its plant, which generates and distributes electric power through a 25-year power purchase agreement with the Puerto Rico Electric Power Authority (**Electric Power Authority**). AES markets wastes from its coal combustion processes as “coal combustion products” under the brand Agremax.

Exposure of local community to coal combustion residuals

¹ Further information about the communication procedure is available at:
<http://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>

AES generates coal ash, also referred to as coal combustion residuals (CCR) as a by-product of the coal combustion process used to generate electricity. CCR refers to wastes from the combustion process, including fly ash, bottom ash, boiler slag, and flue gas desulfurization material. The plant generates approximately 200,000 to 250,000 tons of CCR per year.

Chemical testing commissioned by the United States (US) Environmental Protection Agency (EPA) conducted with samples of CCR from the AES plant reveal that these wastes may contain high levels of heavy metals such as mercury, cadmium, and arsenic, as well as other contaminants and toxic chemicals, which may leak into the water, soil and air. Yet, the US EPA considers CCR a non-hazardous waste (see 40 C.F.R. § 261.4(b)(4)(i)).

A study in 2004 found the presence of heavy metals including arsenic, beryllium, vanadium, and cadmium exceeding the levels of international standards that the AES CCR. In 2018, AES published results of a chemical test showing concentrations of selenium, lithium, molybdenum, chromium, arsenic, radium, boron, and sulfates in nearby wells exceeding applicable federal standards.

Local community members link their exposure to toxic CCR to increases in various diseases and disabilities. Since 2002, cancer rates have allegedly increased. Kidney, prostate, and other cancers are reported in young adults, with cancer clusters mapped in the vicinity of the AES plant and where toxic CCR is disposed. A study found that three out of four residents on one street near the AES plant have some form of cancer. Epidemiological studies conducted in nearby communities have also found that respiratory, skin and cardiovascular diseases, and miscarriages, are more prevalent among communities located near the AES plant than in comparable communities.

Exposure to toxic “Agremax” developed from coal combustion residuals

Under the power purchase agreement with the Electric Power Authority, AES guaranteed that no waste or residue of the coal combustion process would be disposed of in Puerto Rico, nor stored on the island for over 180 days. Puerto Rico does not have any dedicated facilities for the disposal of CCR, such as landfills or impoundments. AES asserted that the company would find a beneficial commercial use for CCR.

Around 2007, the Dominican Republic refused to accept CCR from the AES plant. AES started marketing the CCR as a product for construction sites in Puerto Rico under the brand Agremax: a mixture of fly ash, bottom ash and water, compacted and dehydrated. AES over the years distributed over two million tons of Agremax for use in the construction industry in Puerto Rico, including in the Guayama, Salinas, San Juan, Caguas, Ponce, and Mayaguez municipalities.

Agremax was used as a construction fill for housing development and shopping centers, as well as ballasting roads, leaving it uncovered and exposed. To date, the exact quantity or location of the Agremax disposed of or used in Puerto Rico is unknown. Some of the Agremax deposits have occurred above aquifers used for the extraction of water for human consumption, including the South Coast Aquifer: a sole source aquifer for the residents of the Salinas (population 30,000) and Santa Isabel (population 23,000) municipalities.

By 2011, the US EPA had found that the use of Agremax as construction fill potentially constituted illegal dumping of waste. The US EPA recommended that the the government of the Commonwealth of Puerto Rico adopt rules for the management of CCR taking into account Puerto Rico's environmental conditions. As a result, in 2015 the Puerto Rico Quality Board prohibited the use of Agremax as a construction fill and authorized AES to dispose of CCR in landfills in Peñuelas and Humacao. Local communities organized protests against the disposal of CCR in these landfills, claiming CCR ended up in nearby creeks, leeching into water, soil, and air, and negatively affecting agriculture and the health of residents.

Improper management of coal combustion residuals including Agremax

The EPA has previously found the plant in violation of the Clean Water Act because of unlawful discharges of water contaminated with CCR into nearby communities and water bodies. Until 2015, no landfill had been commissioned for disposal of CCR. Furthermore, Puerto Rico did not have any policies in place to regulate the adequate management and disposal of CCR. Against this background, CCR from the plant from its establishment until 2015 was being accumulated, used, and deposited near the plant in landfills and other dumping grounds, without regard for the health and environment of communities. Without proper management, these contaminants pollute surface and groundwater, soils, and air.

In 2017, the Commonwealth of Puerto Rico adopted a "Ban on the Deposit and Disposal of Coal Ash or Coal Combustion Residuals in Puerto Rico Act", Law 40-2017, which prohibited the deposit and disposal of CCR in landfills in Puerto Rico. Also in 2017, local communities and environmental organizations filed a court case against landfill operators unlawfully accepting disposal of CCR in the form of Agremax. The Puerto Rico First Instance Court dismissed their claim, reasoning that Law 40-2017 preventing the deposit and disposal of CCR does not prohibit the use or disposal of Agremax. The Puerto Rico Court of Appeals confirmed.

Late in 2018, new regulations were proposed addressing the beneficial uses of coal wastes, including Agremax. The regulations again allow for the un-encapsulated use of CCR, such as its use as construction fill material. Unless it exceeds 12,400 tons of material, this use is exempt from public participation and leaching testing requirements.

As at 2019, the AES plant has a large on-site accumulation of CCR, estimated to rise 120 feet, with no cover, posing a continuing risk of exposure to the nearby population and contamination of ecosystems.

Extraterritorial impacts in the Dominican Republic

In 2003, confronted with significant accumulation of CCR and no place to dispose of it, AES contracted to transport CCR from Guayama, Puerto Rico to the Dominican Republic. Approximately 27,000 tons of CCR were deposited at Arroyo Barril and the Port of Manzanillo in the Dominican Republic. Ashes from the CCR were dragged by the coastal breeze to nearby communities, agricultural land, and to the mountains of the town.

Nearby residents, particularly children and the elderly, complained of skin lesions and difficulty breathing linked with dust from abandoned CCR. Several residents were hospitalized. The dumping was reported to have contributed to or resulted in six deaths, and from 2005 to 2008, the rate of abortions and premature births rose suddenly.

In 2007, upon finding that the CCR contained heavy metals, the Government of the Dominican Republic filed a court case against AES, and AES offered a settlement of USD 6 million. The Government of the Dominican Republic agreed to the settlement upon commitment from AES not to continue dumping CCR in the Dominican Republic.

While I do not wish to prejudge the accuracy of these allegations, I am deeply concerned about the reports of alleged violation of the human rights to life, to health, to access to information, to food, and to a clean and healthy environment. Additionally, I wish to express concern about the apparent inadequacy of remedies for the reported violation of the rights of people of Puerto Rico.

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

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide the details of any site-specific enquiries or assessments (including chemical and environmental impact assessments) conducted in relation to the impacts of exposure to CCR and Agremax on the health and environment in Puerto Rico, including the methodologies used and the

results. If no enquiries have taken place, or if they have been inconclusive, please explain why.

3. Please provide details of particular measures including policies your company has put in place to prevent exposure to the toxic chemicals potentially present in CCR and Agremax. Please explain what special protections are afforded to pregnant women and women of reproductive age.
4. Please provide information as to what human rights due diligence steps, as set out in the United Nations Guiding Principles on Business and Human Rights, have been undertaken by your company to identify, prevent, mitigate, and remedy the negative human rights that your company could have caused or contributed to.

I would appreciate receiving a response **within 60 days**. Past this delay, this communication and any response received from your company will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I 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.

I would like to inform your company that a copy of this letter has been shared with the Government of the Dominican Republic, and that a letter addressing similar allegations and concerns as mentioned above has also been sent to the Government of the United States of America.

I may publicly express my concerns in the near future as, in my view, the information upon which a press release would be based is sufficiently reliable to indicate a matter warranting attention. The press release would indicate that I have been in contact with your company to clarify the issues in question.

Please accept the assurances of my highest consideration.

Baskut Tuncak

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

Annex

Reference to international human rights law

In connection with the above alleged facts and concerns, I would like to draw your attention to the United Nations Guiding Principles on Business and Human Rights, which were unanimously endorsed by the Human Rights Council in its resolution (A/HRC/RES/17/31), after years of consultations involving governments, civil society and the business community.

The Guiding Principles have been established as the global authoritative norm for all States and companies to prevent and address the negative consequences related to companies on human rights. The responsibility to respect human rights is a global standard of conduct applicable to all companies, wherever they operate. It exists regardless of the ability and / or willingness of States to meet their own human rights obligations and does not reduce those obligations. It is an additional responsibility to comply with national laws and regulations for the protection of human rights.

The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (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).

To fulfill their responsibility to respect human rights, business enterprises should have in place:

- “(a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute."(Guiding Principles 15)

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 (commentary to Guiding Principle 19).

I would like to recall that Guiding Principle 22 states that: “[w]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes”. The Guiding

Principle 20 states that business should track the effectiveness of their response. Tracking should: a) be based in appropriate qualitative and quantitative indicators; and b) draw on feedback from both internal and external sources, including affected stakeholders.

Guiding Principles 25 to 31 provide guidance to business enterprises and States on steps to be taken to ensure that victims of business-related human rights abuse have access to effective remedy. Business enterprises should remedy any actual adverse impact that they cause or contribute 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 (commentary to Guiding Principle 25).

I would also like to draw your attention to other international human rights standards, relevant for this case. I would like to make reference to the International Covenant on Economic, Social and Cultural Rights (ICESCR), and to General Comment No. 24 (2017) of the UN Committee on Economic, Social and Cultural Rights (CESCR) which affirms that extraterritorial obligations of States under the Covenant follow from the fact that the obligations of the Covenant are expressed without any restriction linked to territory or jurisdiction (para 27). While the United States of America has not ratified the ICESCR, it agreed to bind itself in good faith to ensure that nothing is done that would defeat the object and purpose of the international instrument, pending a decision on ratification.

General Comment No. 24 also provides that extraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory (para 28). The CESCR underlines that the extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective. (para 30).

The CESCR has previously also stated that “corporate activities can adversely affect the enjoyment of Covenant rights”, including through harmful impacts on the right to health, standard of living, the natural environment, and reiterated the “obligation of State Parties to ensure that all economic, social and cultural rights laid down in the Covenant are fully respected and rights holders adequately protected in the context of corporate activities” (E/C.12/2011/1, para. 1). Particularly, business enterprises are required to respect of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health enshrined by Article 12 of the ICESCR. The

CESCR describes the normative content of Article 12 of ICESCR in General Comment No. 14, noting that the private business sector has responsibilities regarding the realization of the right to health (para. 42).

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.