

Mandates of the Special Rapporteur on the human rights to safe drinking water and sanitation; the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the right to development; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment and the Special Rapporteur on the right to food

REFERENCE:
AL OTH 61/2020

18 August 2020

Dear Mr. Klaus R. Michalak,

We have the honour to address you in our capacities as Special Rapporteur on the human rights to safe drinking water and sanitation; Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on the right to development; Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment and Special Rapporteur on the right to food, pursuant to Human Rights Council resolutions 42/5, 35/7, 42/23, 37/8 and 32/8.

We are independent human rights experts mandated by the United Nations Human Rights Council to report and advise on human rights issues from a thematic or country perspective. We are sending this letter under the communications procedure of the special procedures of the United Nations Human Rights Council to seek clarification of the information we have received. The Special Procedures mechanisms can intervene directly with Governments and other stakeholders, including companies, regarding allegations of human rights abuses within their mandates through urgent appeals, letters of allegation and other communications. The intervention may relate to a human rights violation that has already occurred, is ongoing or is at high risk of occurring. The process involves sending a communication to the actors concerned outlining the facts of the allegation, the applicable international human rights norms and standards, the concerns and questions of the mandate-holders and a request for follow-up action. Communications may concern individual cases, general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of existing draft legislation or laws, policies or practices that are considered not to be fully compatible with international human rights standards.

In this context, we would like to draw your urgent attention to the information we have received regarding **possible violations of the right to water in relation to the run-of-river hydropower plant in Alto Maipo, in Cordillera Province.**

According to the information received:

The Alto Maipo Hydroelectric Project is a mega-project financed, among others, by the Inter-American Development Bank and the International Finance Corporation (an entity of the World Bank Group) currently under development. It is a run-of-river plant, which produces electricity using the flow of a river without

building a dam. The project consists of diverting the three main tributaries of the Maipo River for more than 100 kilometers, through tunnels measuring more than 67 kilometers along the Andes Mountains.

The project is located 50 km southeast of Santiago de Chile, and will have an installed capacity of 531 MW and an estimated production of more than 2,100 GWh per year. To date, the project has been financed by two multilateral banks, the Inter-American Development Bank and the International Finance Corporation (a member of the World Bank Group), the Overseas Private Investment Corporation, known since December 2019 as the U.S. International Development Finance Corporation, as well as Itaú-CorpBanca, Banco de Crédito e Inversiones de Chile, Banco del Estado de Chile, KfW Ipex-Bank and DNB Bank ASA.

Environmental and human rights organizations opposing the project estimate serious negative impacts on access to water, agriculture, tourism and the environment. These impacts include the following:

- (1) The flow of the tributaries of the Maipo River (Yeso, Volcán and Colorado) would be reduced by up to 60%. These rivers are the main source of drinking water for the city of Santiago de Chile, with seven million inhabitants, and for the irrigation of 120,000 hectares of farmland in the region.
- (2) The project will cause erosion of the Maipo River bed, affecting public and private infrastructure, including drinking water intakes, irrigation, bridges and other waterways.
- (3) Climate change and desertification, which have caused severe droughts in Chile in recent years, could be exacerbated by the protective role of the Maipo River basin in the local climate and in alleviating air pollution in Santiago, Chile, as a "green corridor".
- (4) The Cajón del Maipo in Chile is home to the Monumento Glacial Natural Reserve (1994), two Nature Sanctuaries (1995 and 2008), as well as other protected areas of ecological, cultural (palaeontological archaeological remains) and environmental interest that receive millions of visitors each year and could be damaged by the project.

On January 30, 2017, the Superintendence of the Environment announced that it was initiating sanctioning proceedings against Alto Maipo SpA. due to 14 breaches of the environmental conditions approved in the project. Nine of these breaches are considered serious ones. The situations of non-compliance include damage to protected wetlands, unauthorized operation of equipment and heavy machinery in protected areas, use of explosives in excess of established limits, failure to report and reduce damage to local fauna, and illegal disposal of

wastewater. As of June 2020, the sanctioning procedure is in the "Compliance Program in Progress" phase.

On 25 March, 2020, organizations opposed to the project reported the melting of a glacier in the area of El Yeso Reservoir, in the municipality of San José de Maipo, which could be caused by explosions in the construction of the El Volcán tunnel, part of the project.

In March 2020, the Committee on Economic, Social and Cultural Rights announced that it would include the Alto Maipo project in the list of issues for Chile's fifth periodic report. The Committee asked the Government about the compatibility of the project with Chile's international obligations in the field of economic, social and cultural rights and with the environmental commitments undertaken in the Paris Agreements.

Without wishing to prejudge the facts alleged, we express our concern that the Alto Maipo Hydroelectric Project would be negatively affecting the availability of water for human consumption and domestic use in the affected areas, in contexts already characterized by climate change and water scarcity. The shortages that the project could also affect the productive capacity of subsistence agriculture in the affected areas, resulting in violations of the right to food and other rights related to the right to an adequate standard of living.

The fact that the Alto Maipo Hydroelectric Project is being carried out without the proper participation of the affected communities, and with significant damage to biodiversity and the environment, could also result in the violation of multiple human rights.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law**, which cites international human rights instruments and standards relevant to these allegations. Although we have also conveyed our concerns to the Government of Chile, financing of a project that could violate human rights cannot be justified by the failure of State authorities to effectively implement national legislation or to comply with international human rights standards that are binding on the State. As noted in the commentary to the Guiding Principles on Business and Human Rights, unanimously adopted by the Human Rights Council in June 2011, "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. And it exists over and above compliance with national laws and regulations protecting human rights." (A/HRC/17/31, Principle 11).

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we 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 detailed information on the measures taken by KfW IPEX-Bank GmbH to avoid negative impact on the human rights to water and sanitation in relation to the Alto Maipo Hydroelectric Project, throughout all stages of development of the mega-project: macro-planning, licensing or authorization, planning and design, construction, short-term operation, long-term operation and decommissioning and disaster management.
3. Please provide information about the human rights due diligence policies and processes put in place by your institution to identify, prevent, mitigate and remedy adverse human rights impacts of your activities, in line with the UN Guiding Principles on Business and Human Rights and related standards such as the IFC Performance Standards
4. Please provide information on the environmental and social impact studies carried out before the construction of the Hydroelectric Project, and whether they were prepared with a human rights approach. In particular please indicate whether any steps were taken to avoid negative social and cultural impacts on the communities located in the area of the project, including by seeking their free and informed consent prior the approval of the project on their traditional lands.
5. Please provide information about specific due diligence measures taken by your institution before deciding to finance the Alto Maipo Hydroelectric Project. In particular, please highlight how your institution conducted meaningful consultation with affected stakeholders and also how you ensured your clients/project sponsors also engaged in meaningful consultation with those stakeholders
6. Please describe the measures that your institution has taken, or plans to take, to prevent recurrence of such disasters in the future.
7. Please provide information on steps taken by your institution to establish operational-level grievance mechanisms to address adverse human rights impacts caused by your institution throughout your operations globally.

This communication and any response received will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the report to be presented to the Human Rights Council.

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.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with you to clarify the issue/s in question.

Please note that letters on the same subject have also been sent to Chile's Banco de Crédito e Inversiones (BCI), DNB ASA, Governments of Chile, Inter-American Development Bank (IADB), International Finance Corporation (IFC), Itaú CorpBanca Bank, and US International Development Finance Corporation (DFC).

Please accept, Mr. Michalak, the assurances of our highest consideration.

Léo Heller

Special Rapporteur on the human rights to safe drinking water and sanitation

Anita Ramasastry

Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Saad Alfarargi

Special Rapporteur on the right to development

David R. Boyd
Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a
safe, clean, healthy and sustainable environment

Michael Fakhri
Special Rapporteur on the right to food

Annex

Reference to international human rights law

In relation to the allegations, without wishing to prejudge the facts alleged, we would like to draw your attention to the explicit recognition of the human rights to drinking water by the United Nations General Assembly (resolution 64/292) and the Human Rights Council (resolution 15/9), which derives from the right to an adequate standard of living protected by both article 25 of the Universal Declaration of Human Rights and article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Chile on 10 February 1972.

In connection with the above-mentioned allegations, we would first like to mention the Guiding Principles on Business and Human Rights (A/HRC/17/31). The Guiding Principles were unanimously adopted in 2011 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.

These Guiding Principles are grounded on the recognition of

- (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- (b) 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;
- (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

The Guiding Principles have established themselves as the authoritative global standard for business to prevent and address negative business-related impacts on human rights. The responsibility to respect human rights is a global standard of conduct applicable to all enterprises, transnational and otherwise, regardless of size, sector, location, ownership and structure. It exists independently of the capacity and/or willingness of States to meet their own human rights obligations and does not diminish those obligations. It is an additional responsibility to that of complying with national laws and standards for the protection of human rights.

Principles 11 to 24 and Principles 29 to 31 provide guidance to companies on how to fulfil their responsibility to respect human rights and provide remedies where they have caused or contributed to adverse impacts. The commentary to Principle 11 states that "[b]usiness enterprises should not undermine States' abilities to meet their own human rights obligations".

The Guiding Principles have identified two main components of the corporate responsibility to respect human rights, which require that business should: "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).

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (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 Principle 15)

This process of identifying and assessing actual or potential negative human rights consequences should include meaningful consultation with potentially affected groups and other stakeholders (Guiding Principle 18).

Also, Principle 22 provides 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." "Operational-level grievance mechanisms for those potentially impacted by the business enterprise's activities can be one effective means of enabling remediation when they meet certain core criteria, as set out in Principle 31". (Commentary on Guiding Principle 22).

We would like to recall the thematic report of the Working Group on the issue of human rights and transnational corporations and other business enterprises to the General Assembly (ref. A/73/163). In the report, the Working Group noted that "the Guiding Principles clarify that the responsibility of a business enterprise to respect human rights relates to the adverse human rights impacts to which its operations, products and services are linked in all tiers of its value chain. Moreover, each business enterprise should ensure that its own practices, for example, selling defective parts or unhealthy ingredients, irresponsible purchasing practices, or low-cost, fast-delivery business models, do not contribute to adverse human rights impacts caused by entities in the value chain". Human rights due diligence involves (a) Identifying and assessing actual or potential adverse human rights impacts that the company has caused or contributed to through its activities, or that are directly related to the operations, products or services provided by its business relationships; (b) Integrating the results of impact assessments into relevant company functions and processes, and taking appropriate action in accordance with its involvement in the impact; (d) Communicate how the adverse impacts are addressed and demonstrate to stakeholders - particularly those affected - that appropriate policies and processes are in place to implement respect for human rights in practice.

In its general comment No. 15, the Committee on Economic, Social and Cultural Rights (CESCR) indicated that the human right to water means that everyone has the right to sufficient, safe, acceptable, physically accessible and affordable water. It also indicated that water is necessary for the realization of many of the rights recognized in the ICESCR, such as the production of food (the right to adequate food) and environmental hygiene (the right to health), and for providing livelihoods (the right to earn a living through work). However, the CESCR stated that the right to use water for personal and domestic purposes and to prevent hunger and disease should be given priority in the allocation of water over its economic uses. The CESCR also stressed the importance of securing agricultural water resources for disadvantaged and marginalized farmers, particularly women, so that they have equitable access to water and water management systems.

According to CESCR General Comment No. 15, each person's water supply must be continuous and sufficient for personal and domestic uses, including consumption, sanitation, washing, food preparation and personal and domestic hygiene. The water must be safe, and therefore must not contain microorganisms or chemical substances harmful to health. In addition, the water must be of an acceptable colour, odour and taste.

The CESCR also stressed the obligation of States parties to ensure that the allocation of water resources and investments in the water sector facilitate access to water for all members of society, so that water is available to all, without discrimination, including the most vulnerable and marginalized sectors of the population. In times of severe resource constraints, States parties would be obliged to protect the vulnerable members of society by adopting specific programmes.

The CESCR also clarified in its General Comment No. 15 that States parties are obliged to prevent third parties, such as individuals, groups, corporations and other entities, from impairing the enjoyment of the right to water, for example by denying equal access to safe drinking water or by inequitable exploitation of water resources.

Finally, we would like to draw your attention to the 2019 report of the Special Rapporteur on the human rights to drinking water and sanitation (A/74/197), in which he presents a framework for action so that mega-projects contribute to improving people's livelihoods and do not hinder the enjoyment of the human rights to water and sanitation. With the aim of preventing and mitigating the risks associated with such projects and ensuring that they comply with human rights, the Special Rapporteur presents a framework for the mega-project cycle for the realization of the human rights to water and sanitation, which consists of seven stages, each of which has a different impact on access to water and sanitation and the factors that hinder or promote the realization of the human rights to water and sanitation. The report provides a list of questions that serve as guidelines for responsible actors, including private companies, to fulfil their human rights obligations and responsibilities.