

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

REFERENCE:
AL IND 4/2016

25 July 2016

Excellency,

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 27/23.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the recent settlement reached between Hindustan Unilever Ltd (HUL) and the former workers of their thermometer factory in Kodaikanal.

According to the information received:

In 2001, a mercury thermometer factory operated by Unilever subsidiary Hindustan Unilever Ltd (HUL) was shut down by state environmental regulators after it was found to have illegally disposed of tonnes of hazardous mercury wastes at a local scrapyards. In addition, the factory site, which is situated between two biodiverse and ecologically valuable watershed forests in Kodaikanal, southern India, was found heavily contaminated with mercury. Mercury levels were alleged to have been more than 50,000 times higher than naturally occurring soil background values in some areas.

A 2002 study by Unilever's consultant URS Dames & Moor reported that HUL discharged more than 1.3 tonnes of mercury into Pambar Shola Reserved Forest. This mercury waste has not and cannot be recovered and shall remain within the forest ecosystem. In 2015 the National Environment Engineering Research Institute (NEERI) concluded that silt-bound mercury continued to be leaking from the contaminated site, based on its finding that three out of five sediment samples taken from streams in Pambar Shola forests contained elevated levels of mercury. In March 2016, Hindustan Unilever Ltd (HUL) reached a settlement with approximately 591 former employees who once worked at the factory that requires Unilever to clean up the contaminated site.

According to information received, Unilever refused to clean up the site for 15 years, and when they finally agreed to do so, this was the result of public pressure and outrage, not corporate responsibility. It is reported that millions of people shared the viral music video 'Kodaikanal Won't', and more than 150,000 people in over 100 countries petitioned and tweeted to hold Unilever accountable.

According to Unilever, the settlement agreement was made on humanitarian grounds and represents an end to a longstanding matter that had been pending in the Madras High Court, is in accordance with the suggestion of that court that the parties seek an out-of-court resolution and that HUL is fully committed to upholding the UN Guiding Principles of Business and Human Rights.

Unilever also states that it requires the consent from the statutory authority Tamil Nadu Pollution Control Board (TNPCB) to proceed with remediation. The TNPCB was constituted in 1982 pursuant to the Water (Prevention and Control of Pollution) Act, 1974 and enforces the rules made under the Environment (Protection) Act, 1986 which includes inter alia, the Environment (Protection) Rules, 1986; the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008; the Manufacture, Storage and Import of Hazardous Chemical Rules 1989 as amended. The TNPCB is the statutory authority in the state of Tamil Nadu, India to set soil remediation criteria.

Controversially, Unilever has chosen to use a standard of 20 to 25 milligrams of mercury per kilogram of soil to remedy the situation. Unilever claims that this is the remediation standard set by the TNPCB based on an approved scientific methodology of site specific risk assessment by the National Environment Engineering Research Institute (NEERI) validated by the Central Pollution Control Board (CPCB). Unilever is confident that the use of such a standard would reduce the present mercury contamination level to one that is safe for human health.

Unilever also claims that this standard will protect the environment as independent studies have found that a lower standard would lead to greater soil evacuation and the uprooting of more trees. According to Unilever there has been no impact on the environment outside the factory premises, with the exception of a small area, on the perimeter of the factory, where rain water and entrained soil used to run off the slope from the factory site to the Pambar valley on the southern side, away from the lake. As a matter of precaution, silt traps were allegedly used to mitigate any environmental risk in 2001. Unilever claims that HUL is committed to remediate this and has included it in the Detailed Project Report submitted in 2015 to the TNPCB.

Unilever maintains that the ceasing of their operations in March 2001, the removal of all mercury-bearing material in 2003 and the subsequent decontamination and safe disposal of plant, machinery and materials used in thermometer manufacturing in 2006 have removed the risk of any run-off from the site causing further mercury contamination.

However, it has also been brought to my attention that Unilever's proposed standard of remediation (20 mg of mercury per kg of soil) has been contested by a range of actors.

First, critics allege that Unilever's insistence of a risk assessment study based upon a 'residential' standard, indicates its refusal to acknowledge the ecological sensitivity and geographical proximity of the contaminated site with Pambar Shola Reserve Forest, which requires the highest level of protection to the millions of water users and fish consumers downstream.

Second, critics allege that Unilever's proposed standard will leave behind a site that will leach mercury into the soil and surface waters of the forest for decades to come. Based on Unilever's remediation standard, one third of the 366 kg of mercury that is conservatively reported as contaminating the soil on site will allegedly remain, once the remediation is completed. In addition it is also alleged that additional mercury at concentrations between 0.1mg and 10mg/kg have been deposited at shallow depth across the site (75kg) and to the north and south of the site (30 kg) primarily from airborne mercury emitted from the factory.

Third, critics also question the non-transparent and secretive process by which the remediation standard was arrived at with the TNPCB, and point out that the TNPCB did not conduct independent studies, but allowed Unilever to engage its own consultants. For instance, it is alleged that Unilever paid for the NEERI study (\$52,000USD) on site remediation and to determine the site specific target level for clean up. It is alleged that NEERI recommended a clean up standard of 25mg/kg whereas it had proposed a standard of 10mg/kg at the Local Area Environment Committee (LAEC) meeting on 3 May 2005. (The LAEC was set up by the Tamil Nadu Pollution Control Board in line with the directions of the Supreme Court Monitoring Committee on Hazardous Wastes).

Finally, it is alleged that there has been a failure to conduct an adequate and site-specific risk assessment. General concern has been raised by Unilever's downplaying of the dangers of residual mercury onsite, including the ongoing leaking of mercury from the factory to the Pambar Shola forest. There has been no ecological study of the impact of 1.3 tonnes of mercury that has already entered the forest habitat.

While I do not wish to prejudge the accuracy of these allegations, concern is expressed that the remediation plan proposed by Unilever for the city of Kodaikanal would not mitigate future environmental and human right impacts to the greatest extent possible. Concern is also expressed regarding the failure to ensure an effective remedy for workers and community victims in a timely manner. Grave concern is expressed about the dangers of residual mercury onsite including the ongoing leaking of mercury from the factory to the Pambar Shola forest. Particular concern is expressed that chronic exposure to mercury by young children during critical periods of development, directly or through their mother, can have severe and irreversible impacts on their right to the highest attainable standard of health. Concern is also expressed regarding the right to adequate housing, as the remediated site is planned for residential use.

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.

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 therefore 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 risk assessment or ecological study in relation to this case, including the methodologies used and the results. If no inquiries have taken place, or if they have been inconclusive, please explain why.
3. Please clarify whether the TNPCB conducted independent studies or whether it allowed Unilever to engage its own consultants.
4. Please provide details on how the Government plans to ensure accountability of those responsible for human rights abuse.
5. Please provide details as to when the Government expects remediation will begin, and what measures of protection are being taken in the interim to protect local communities and monitor potential exposures.
6. Does Unilever require the consent from the statutory authority Tamil Nadu Pollution Control Board (TNPCB) to proceed with remediation? Does it require consent from any other national/central Government body? If so, please explain what is the cause for the delay by TNPCB.
7. Given the ecological sensitivity and geographical proximity of the contaminated site with Pambar Shola Reserve Forest, please explain why a risk assessment study based on a 'residential' standard approved by the National Environment Engineering Research Institute (NEERI) was chosen instead of a higher standard of protection.
8. Is it correct that National Environment Engineering Research Institute (NEERI) recommended a clean-up standard of 10 mg/kg at the LAEC meeting on 3 May 2005?
9. Please explain any Government's measures (at the national and subnational level) to provide medical assessment and treatment to the affected workers, affected communities and especially children and pregnant women and girls? What steps does the Government plan to take to fulfill its obligation to respect human rights in a way that complies with

international human rights standards such as the right to health of affected individuals?

10. What steps have been taken by the Government to implement the UN Guiding Principles on Business and Human Rights?
11. What measures, including policies, legislation, regulations and adjudication, has the Government put in place to prevent, investigate, punish and redress human rights abuses by business enterprises within its territory and/or jurisdiction?
12. Please indicate if the Government has provided any guidance to business enterprises in India on their corporate responsibility to respect human rights, specifically on the expected due diligence process, in line with the UN Guiding Principles on Business and Human Rights?

I would appreciate receiving a response within 60 days.

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 Excellency's Government that a letter addressing similar allegations and concerns as those mentioned above has also been sent to Mr. Paul Polman, CEO of Unilever.

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

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, 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 above alleged facts and concerns, I would like to draw your Excellency's Government's 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;
- The International Covenant on Economic, Social and Cultural Rights;
- The International Covenant on Civil and Political Rights;
- The Convention on the Rights of the Child, and;
- The UN Guiding Principles on Business and Human Rights.

I would like to recall the relevant international human rights obligations that your Excellency's Government has undertaken. In particular, the Universal Declaration of Human Rights, article 25, which recognizes the right of everyone "to a standard of living adequate for the **health and well-being** of himself and of his family, including food, clothing, housing and medical care" and article 19, which guarantees the right to "seek, receive and impart **information**".

Furthermore, I wish to draw the attention of your Excellency's Government to article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), acceded by your Excellency's Government on 10 April 1979, which enshrines the right of everyone to the enjoyment of the highest attainable standard of physical and mental **health**. General Comment No. 14 (2000) of the Committee on Economic, Social and Cultural Rights describes the normative content of article 12 and the legal obligations undertaken by the States parties to the Covenant to respect, protect and fulfill the right to health. In paragraph 11 of General Comment No. 14, the Committee interprets the right to health as "an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information".

I would also like to draw your Excellency's Government's attention to article 7 of the ICESCR, enshrining the right of everyone to the enjoyment of just and favourable conditions of work, including **safe and healthy working conditions**. The above-mentioned General Comment No.14 holds that the improvement of all aspects of environmental and industrial hygiene comprises, inter alia, "preventive measures in respect of occupational accidents and diseases [and] the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health". I would also like to stress that the right to work is a fundamental right, recognized in the ICESCR. As specified in General Comment No. 18 (2005) on article 6 of the Covenant, work must be "decent work", that is, "work that respects the

fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration.”

I wish to draw your attention to article 6.1 of the International Covenant on Civil and Political Rights (ICCPR), acceded by your Excellency’s Government on 10 April 1979, which states that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” We would also like to call your attention on General Comment No. 6 (1982) of the Human Rights Committee on the **right to life**. According to the Human Rights Committee, the expression “inherent right to life” should not be interpreted in a restrictive manner. The protection of the right to life therefore requires States to adopt positive measures to implement this right, including measures to reduce infant mortality and increase life expectancy.

Additionally, I would also like to refer to your Excellency’s Government to article 19 of ICCPR, which stipulates the right to “seek, receive and impart **information**”. In this context, I call your attention to the importance of the right to information about hazardous substances to the general public, as outlined in my report to the Council (A/HRC/30/40).

In addition, article 6 of the Convention on the Rights of the Child (CRC), which your Excellency’s Government ratified on 11 December 1992, recognizes that every child has the inherent right to life and that requires that States Parties ensure to the maximum extent possible the survival and development of the child. It further requires State Parties to take all effective and appropriate measures to diminish infant and child mortality. Moreover, the Article 24 of the CRC recognizes the right of the child to the enjoyment of the highest attainable standard of **health** and to facilities for the treatment of illness and rehabilitation. The article 24, paragraph 2 (c) of the Convention specifically requires States to pursue the full realization of the right of the child to the enjoyment of the highest attainable standard of health taking into consideration the dangers and risks of environmental pollution.

Finally, I would like to highlight the UN Guiding Principles on Business and Human Rights, which were unanimously endorsed by the Human Rights Council in its resolution (A/HRC/RES/17/31) in 2011. These Guiding Principles are grounded in 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; and
- c) “The need for rights and obligations to be matched to appropriate and effective remedies when breached.”

All States have a duty under the international human rights legal framework to protect against human rights abuse by third parties. Guiding Principle 1 clarifies the State

duty “to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.” This obligation requires that a State take appropriate steps to “prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.” In addition, this requires, inter alia, that a State should “enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights...” (Guiding Principle 3). The duty applies to all internationally recognized human rights as set out in the International Bill of Human Rights and the fundamental labour rights as set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work. The Guiding Principles also require States to ensure that victims have access to effective remedy in instances where adverse human rights impacts linked to business activities do occur.

The Guiding Principles also clarify that business enterprises have an independent responsibility to respect human rights. However, States may be considered to have breached their international human law obligations where they fail to take appropriate steps to prevent, investigate and redress human rights violations committed by private actors. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures.

Business enterprises, in turn, 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). 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 (commentary to Guiding Principle 25).