

RIGHT TO INFORMATION ON HAZARDOUS SUBSTANCES AND WASTES

Summary of the Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Mr. Baskut Tuncak (A/HRC/30/40)

*The report is available in all UN languages at:
<http://www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/Righttoinformation.aspx>

In his 2015 report, the Special Rapporteur clarifies the scope and content of the right to information throughout the life cycle of hazardous substances and wastes and identifies several challenges that have emerged in realizing this right—as well as potential solutions to these problems. He discusses several obligations of States and the responsibilities of business in relation to implementing the right to information on hazardous substances and wastes.

The Special Rapporteur emphasizes that the right to information on hazardous substances and wastes is central to the enjoyment of human rights and fundamental freedoms. He argues that information should be available, accessible and functional for everyone, consistent with the principle of non-discrimination.

HUMAN RIGHTS IMPLICATIONS OF THE RIGHT TO INFORMATION ON HAZARDOUS SUBSTANCES AND WASTES

People have a right to know whether they are being exposed to hazardous substances. Yet, whether in consumer products, food or other sources of exposure, information is not available or accessible. Over the past several decades, tens of thousands of different hazardous substances have been used by businesses with inadequate information on their properties and uses, as well as their fate as waste, to assess their impacts on human rights. The right of victims to an effective remedy, the right to meaningful participation, the right not to be subject to experimentation without consent, the right to the highest attainable standard of health and several other human rights have all been frustrated by large information gaps throughout the life cycle of substances and wastes.

Information on risks, mitigation measures and safer alternatives can help prevent harm and save lives from premature deaths due to hazardous substances. On the other hand, information gaps create a fundamental impediment to realizing several human rights. For instance, lack of information and lack of consent to be exposed to substances and their risks affect the individual's right not to be subjected without free consent to medical or scientific experimentation. Additionally, information gaps regarding hazardous properties, uses and exposure to hazardous substances create additional uncertainties and unknowns that can obstruct access to an effective remedy for victims.

NORMATIVE CONTENTS OF THE RIGHT TO INFORMATION ON HAZARDOUS SUBSTANCES AND WASTE

In the report, the Special Rapporteur argues that information should be available, accessible and functional for everyone, consistent with the principle of non-discrimination.

(1) **Availability:** Information is available when current reliable information has been generated and collected in a manner adequate to assess the magnitude of potential adverse impacts on the rights of people from hazardous substances and wastes. Necessary information on hazardous substances and wastes can include, for example, their intrinsic hazards and properties, actual and potential uses and releases, as well as protective measures and regulations. It also includes details about the amounts of substances present in people and their environments compared with risks, and the prevalence of adverse

impacts linked to hazardous substances, such as cancer, impaired brain function, heart disease and other non-communicable diseases.

(2) Accessibility: Information is accessible when everyone can seek, obtain, receive and hold available information. Information is physically accessible when information is provided in a timely manner, either in response to public inquiries or when the information holder or information generator actively disseminates information. Information should be physically accessible at the time of purchase and when using a product containing hazardous substances. To be economically accessible, the cost of accessing information should be kept at a minimum, possibly charging only the cost incurred for reproduction of information.

(3) Functionality: To be functional, information should be scientifically accessible, imparting knowledge with a reasonable degree of effort on the part of the intended user. Technicalities must be translated into a language that is functional, to enable individuals and groups of individuals to make informed choices.

(4) Non-discrimination and equality: Disaggregated and specialized information is required to understand and prevent disproportionate implications and impacts of hazardous substances and wastes on individuals and specific population groups, including different ages, incomes, ethnicities, gender as well as minorities and indigenous peoples.

LIMITATIONS TO THE RIGHT TO INFORMATION ON HAZARDOUS SUBSTANCES AND WASTES

Recurring challenges to realizing the right to information in the context of hazardous substances are exceptions for commercial secrets and claims of confidentiality. The refusal to disclose information because it would adversely affect the value of intellectual property or the confidentiality of commercial businesses or industrial information is not legitimate if it may hamper public health or the overall public interest. Certain types of information about hazardous substances cannot be legitimately claimed as confidential. It is not legitimate to claim that public health and safety information on hazardous substances is confidential.

OBLIGATIONS OF STATES

The obligation to implement the right to information on hazardous substances and wastes stems from various rights including those rights that are implicated through adverse impacts of hazardous substances and wastes and rights that specifically stipulate the obligation of States to provide access to information. To protect human rights affected by hazardous substances, States are duty-bound to generate, collect, assess and update information; effectively communicate such information, particularly to those disproportionately at risk of adverse impacts; to ensure confidentiality claims are legitimate; and to engage in international cooperation to ensure that foreign Governments have the information necessary to protect the rights of people in their territory.

(1) To generate, collect, assess and update: States have a duty to generate, collect, assess and update information on hazardous substances and wastes. This duty needs to be carried out regularly, systematically and with special attention given to continuing innovation in the development of new substances with unique risks, and information being generated about the risks of hazardous substances. Substances must be assessed for: (a) their hazardous properties, such as the ability to cause cancer or explode; (b) the likelihood of exposure, including for those at risk of disproportionate levels of exposure; (c) the risk of harm; and (d) options available to prevent harm.

(2) To effectively disseminate information: States have a duty to effectively disseminate information to everyone who may be adversely affected by the production, storage, use, release and disposal of hazardous substances and wastes. This includes the obligation to communicate information both actively and on demand, as well as to make information functional.

(3) To identify and inform those at risk of disproportionate impacts: In order to protect those most at risk, States must ensure that disaggregated information is available and accessible regarding the risks of hazardous substances to various population groups. States must ensure information flows effectively to communities at risk to enable them to be aware of risks and options to prevent harm.

(4) To ensure confidentiality claims are legitimate: Ensuring the legitimacy of confidentiality claims is an inherent challenge given that the information to be scrutinized for legitimacy is secret. Secrecy serves as a barrier to accountability, remedy and democratic decision-making by consumers and communities. It can also prevent international cooperation from tackling the global challenge of managing hazardous substances and wastes. Given the challenges described above, increased vigilance is required on the part of States to protect against illegitimate confidentiality claims.

(5) To engage in international cooperation to help make information available and accessible: Many of the challenges to States to protect those within their territory from hazardous substances result from actions or inactions abroad, such as the export of products containing hazardous substances or the release of hazardous substances that can travel long distances through wind, water and food sources.

RESPONSIBILITIES OF BUSINESSES

Businesses have a responsibility to respect human rights. The Guiding Principles on Business and Human Rights elaborate on existing standards and practices for States and businesses. Businesses have a responsibility to respect, at a minimum, all internationally recognized human rights. In discharging their duty to conduct human rights due diligence, businesses are responsible for identifying and assessing the actual and potential impacts of hazardous substances and wastes, either through their own activities or as a result of their business relationships; to communicate information to other businesses, governments and the public effectively.

(1) To identify and assess adverse impacts: When conducting due diligence, businesses should identify and assess actual and potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships.

(2) To effectively communicate information: Businesses have a responsibility to publicly communicate information about the risks created by their activities and how they mitigate and address both actual and potential human rights impacts with which they might be involved, including businesses that use, produce and release hazardous substances. Businesses also have a responsibility to communicate information to individuals or groups at disproportionate risk of adverse impacts.

(3) To engage in cross-border cooperation: The ongoing expansion of supply chains and business relationships around the world — resulting in increased production, use and disposal of hazardous substances and wastes in countries with limited capacity to ensure their safe use and disposal — heightens the responsibility of businesses to ensure their products do not cause or contribute to human rights violations because of hazardous substances, both at home and abroad. Businesses need to have appropriate tracking mechanisms in place to ensure that actual and potential human rights impacts are addressed, whether they cause or contribute to these impacts.

KEY RECOMMENDATIONS BY THE SPECIAL RAPPOREUR

(1) To ensure information is available

- States must generate, collect, assess and update information about the properties, uses, emissions and the fate of hazardous substances and wastes necessary for assessing actual and potential impacts on human rights, including the right to life and health.

- Businesses should undertake robust human rights due diligence for actual and potential impacts of hazardous substances and wastes linked to their activities, including identifying and assessing adverse impacts that may result therefrom.

(2) To ensure information is accessible

- States must actively inform the public of the risks of hazardous substances and wastes, including those at risk of disproportionate impacts. States should ensure that people have access in adequate languages and formats to information on specific adverse impacts of hazardous substances released into their environment and in everyday products.
- States should ensure any limitations to the right of access to information on hazardous substance and wastes should be in conformity with the law, the principle of proportionality and necessity, reasonable purpose and objective and protection of the right of others.
- States and businesses should provide an exhaustive list of information or types of information that is not publicly accessible but provided to governments, including the reason for non-disclosure.
- Businesses whose activities result in imminent threats must convey to the government authorities and the public a threat to public health or the environment, providing full access to information about risks, impacts and mitigation measures.
- Businesses should ensure that information on human rights impacts of hazardous substances and wastes flows up and down the supply/value chain, including between operations in foreign countries.

(3) To ensure information is functional

- States must ensure that information is presented in a form that allows the recipient to protect, respect, fulfil and enjoy human rights and that all necessary information is available and accessible to ensure access to an effective remedy and meaningful public participation.
- Businesses should communicate information to Governments, and be subject to regulation and strict guidelines about information. Businesses should also communicate to the public relevant information about hazardous substances in their supply chains and products in a user-friendly format.

(4) To ensure non-discrimination in the generation, collection or production of information

- States must ensure disaggregated information is available on actual and potential impacts to those at heightened risk of adverse impacts due to their proximity or geographic location, physical conditions, economic status, occupation, gender or age.
- States must ensure that information is available and accessible on the risks of childhood exposure to hazardous substances and wastes, paying close attention to pre and postnatal periods.

(5) To increase international and cross-border cooperation

- States should create a global database of information on hazardous substances and wastes, including a repository of intrinsic properties, uses, protective measures and regulations/restrictions and other information necessary to protect human rights from hazardous substances.
- States should implement the Guiding Principles on Business and Human Rights with special attention to hazardous substances and wastes, particularly to the responsibility of the chemical manufacturers to realize the right to information.