From
S.Faizi
Environmental Expert Member of the Plachimada High Power Committee
Trivandrum
09497012590
s.faizi111@gmail.com

23-9-2011

To
Shri P Chidambaram
Honourable Minister of Home Affairs
New Delhi

Sub: Presidential assent to the Plachimada Coca-Cola Victims' Relief and Compensation Claims Special Tribunal Bill, 2011- Coca-Cola's legal opinion- my response.

Honourable Minister,

Greetings. As the Environment Expert Member of the Plachimada High Power Committee (HPC), I have seen the 'legal opinion' of the Cola company forwarded by the Home Ministry to the Kerala govt, arguing against the captioned Bill. Here I respectfully submit my response to the arguments of the company. However, before doing so I wish to submit that the Cola company that has violated numerous laws of the land, as found by the HPC of 14 expert members and chaired by Additional Secretary (Home), has been engaged in a sustained vicious campaign to challenge the HPC when it was formed, when its report was released without even reading the report, at the company's shareholders meeting at Atlanda last year, when the Bill was passed by the Assembly and on other occasions, each time the unrepentant company exposing itself before the discerning public. At the very outset of the work of the HPC, the Cola had sent a somewhat similar legal letter to us too, written in an intimidating language and we treated it the way it deserved.

2. At no point in the Presidential assent issuing process is there provision for the central government entertaining legal opinion prepared on behalf of a private sector company on a Bill passed by a state Assembly. However, if the opinion of the company was entertained then natural justice demanded hearing the view of the other side which in this case is the poor Cola victims of Plachimada, more so since the Cola company is supported by the most powerful government on earth and its diplomatic missions in the country while the Cola victims have no such luxuries to claim. Sending the legal opinion of the Law Ministry or the Solicitor General of India seeking clarifications, if any, would have been far more appropriate.

3. I wish to submit to you as a political leader that the circumscribed, impoverished people of Plachimada has sustained their years long Gandhian agitation against the destruction of the natural resource base of their village by the Cola company, on the inspiration and support

they have received from all over the country; one of the important source of such inspiration and support has been Smt Sonia Gandhi, the AICC President[1].
I have got to see the legal opinion prepared by Senior Advocate Shri KK Venugopal on behalf of the Cola company that was sent to the Kerala govt by the Home Ministry, and here I offer my comments on the same.

Misinformation in legal opinion:
4. The Opinion in its early part is replete with misinformation. Let me address a few samples here. It states that the Cola plant was 'voluntarily' closed by the company in 2004. The fact is that this water depleting factory in the drought prone district of Palakkad was ordered to be closed in March 2004 at the instruction of the then chief minister and your current cabinet colleague Shri A K Antony. The application for authorization under the Hazardous Wastes (Management and Handling) Rules submitted by the Cola company was refused by KSPCB on 23 February 2004 on the ground that the required facilities for the treatment of the hazardous sludge were not installed by the Company, and subsequently on 23.8.2004 directed the company to remain closed. This was also in line with the order issued by the Hon Supreme Court on 14.10.2003 on the enforcement of the Hazardous Wastes (Management and Handling) Rules. Let me quote from the KSPCB order of 23.8.2004 so that this blatant falsehood repeated by the Cola officials could be put to rest, 'Now therefore as per the direction contained in the said Supreme Court order, you are hereby directed to close down your factory forthwith and keep it closed unless and until you prove to the undersigned that your unit has complied strictly with the provisions of the Hazardous Wastes Rules.' Now, from the Company's CEO Mr Muhtar Kent to its PROs to its legal advisor are seeking to mislead their audience on this critical fact.

The Opinion also falsely claims that 'no evidence of excessive extraction of or of pollution being caused by the operation of the plant' has been found.

Pollution caused by the Cola company:
5. High levels of hardness and chlorides were found in the water samples collected near the plant on 25.2.2002 and analysed at the Sargham Labs. Studies conducted by the Ground Water Department from 2002 to 2006 too showed a marked increase in the level of hardness and chlorides as the plant's operations progressed and a gradual reduction in the level of pollution intensity a couple of months after its closure in March 2004. The pollution intensity increased with increase in proximity to the plant and vice versa. The pollution and consequent diseases in the area were so bad that the District Medical Officer of Palakkad had to ask the local people, by his letter of 8.4.2003, not to use water in the wells near the Cola plant for drinking purpose.

6. The chloride and hardness pollution was dwarfed by the finding of huge levels of cadmium in the sludge generated by the plant which it has criminally spread all over the village by deceiving the unsuspecting farmers as a good manure.The investigation conducted by KSPCB in 2003, under the leadership of its chairman, found the level of the lethal Cadmium in the sludge at 201.8 mg/kg which was more than four times the permissible level of 50 mg/kg as prescribed by the Hazardous Wastes Rules. A subsequent study conducted by the Central Pollution Control Board (CPCB) in November 2003 found the level at the deeply

worrying level of 333.8 mg/kg! Cadmuim was spread all over the village land as the company was distributing it in the guise of fertilizer. The groundwater of the village too was contaminated by the leached Cadmium as KSPCB's and other studies have shown. A comparative study conducted by the Kerala Agricultural University has found high levels of Cadmium in cow milk, chicken meat, egg, fodder etc at Plachimada.

Groundwater depletion caused by the company:

7. The data collected by the Kerala Groundwater Department glaringly tells of the critical water depletion caused by the Cola company. Analysis of the groundwater data has shown that there was a 10.6-12 mts (below ground level) drop in the phreatic aquifer (groundwater) system around the plant area in December 2002 and this has further dropped to 11.4-13 metersin May2003 inspite of the better rainfall in that year's summer, in contrast to the rest of the Chitoor Block. After the plant was closed in March 2004, the water level slowly and gradually began to rise as was found in May 2004 and May 2006.

8. HPC has found that the Cola company was using water in this water scarce area that was to be used for domestic and agricultural purposes, causing the water crisis in the area. The Central Groundwater Board has determined the maximum groundwater recharge in the Plachimada watershed as 8 per cent and taking this maximum rate, the total available groundwater there was found as 3.105 million cubic meters. And considering the total water requirement of the area (domestic, agricultural and livestock), Plachimada has an annual water deficit of 0.1168 mcm, which means that the 0.1825 mcm that the company was drawing was the water meant for domestic and agricultural/livestock purposes. The water tragedy played out at Plachimada was a result of this.

Legislative competence- international treaties in relation to the distribution of legislative powers

It is interesting to see the progression of the Cola company's arguments- from outright denouncing the High Power Committee, to challenging the HPC report as based on 'unfounded assumptions' to now questioning the legislative competence of the Kerala Legislature Assembly to enact the Bill.

9. Senior Advocate Shri KK Venugopal's argument is that the National Green Tribunal Act 2010 was enacted to implement the decisions of the UN conferences in Stockholm and Rio de Janeiro, as stated in the preamble of the statute and thereby the subjects covered by the Act have come under entry number 13 (international conferences/decisions) of the Union List of the Constitution read with Article 253, and therefore the State Assembly has no power to make legislation on these subjects and that the Green Tribunal Act and the Kerala Bill have conflicting provisions and when the Kerala Bill comes into force only the provisions of the Green Tribunal Act shall prevail. In my opinion this is an irrelevant argument.

10. In replying to this I should mention at the outset that I have been a negotiator in the Rio de Janeiro Summit process (UN Conf on Envt and Devt), particularly in negotiating the final draft of the Rio Declaration on Envt and Devt referred above. There are two fundamental

related issues involved here: a) the status of the Rio Declaration and Stockholm declarations, and b) the true meaning of Article 253 (read with Article 731.b&51.c)

The status of international declarations

11. There is a critical difference, in international law, between treaties/conventions and international declarations/decisions. The treaties are negotiated by an intergovernmental negotiation committee, signed by duly authorized and accredited Plenipotentiaries, Ratified or Acceded to as required by the concerned Party's domestic law, and submission of the Instrument of Ratification to the concerned treaty secretariat or depository State. And treaties are guided by the Vienna Convention on Law of Treaties, to which India is also a Party. Treaties are legally binding on the Parties that have Ratified/Acceded to the same, except for reservations if such a provision is provided in the treaty at all. Parties are expected to create domestic law for the national implementation of the treaty, particularly if there arelegal impediments in currency. Rio Summit had three such treaties, each one negotiated and adopted separately, namely the Convention on Biological Diversity, UN Convention on Climate Change and the Convention to Combat Desertification.The Rio or Stockholm Declaration does not constitute such a treaty.

12. Declarations/decisions are by no means legally binding on the participating countries. However, they do have a tremendous moral and political force, and it is this force that prompts States and all other stakeholders to implement these- to the extend they themselves decide. 'Governments at various levels' (from the federal govt to local self govts) are expected to implement such decisions/declarations as well as a number stakeholder groups (called 'major groups'). Law making at various levels is also expected to be consistent with the objectives of these instruments. Interestingly, the Rio Summit had one outcome that explicitly mentions the legally non-binding nature of such instruments in the title of the document itself ie. *"Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests"*. It is the same with regard to the Stockholm Declaration too.

13. The invoking of the parts of the Stockholm Declaration and Rio Declaration, in the preamble of the Green Tribunal Act is only inspirational and not setting the juridical basis for the Act; the juridical basis for the Act is robust and glaring as mentioned in the same preamble, namely, the right to healthy environment as part of the right to life as provided in Article 21 of the Constitution.

14. The Green Tribunal Act refers to and therefore Shri K KVenugopal quotes the Principle 13 of the Rio Declaration that calls upon States to develop domestic laws regarding liability and compensation for environmental damage. It is pertinent to observe that while at the Rio Summit India joined the consensus to adopt the Rio Declaration, Indian govt took a different position on the same issue when the concept of liability and compensation for environmental damage was introduced in international law for the first time, namely, in the Convention on Biological Diversity (CBD)- Article 14.2, the negotiations on which took place in parallel to the negotiations on the Rio Declaration. At the Nairobi Final Act of the Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity, Indian govt made the following statement on 22 May 1992, ' *The govt of India is of the view that the issue of*

liability and compensation for damage to biological diversity referred to in Article 14 para 2 of the Convention, is not a priority area of work to be addressed by the Conference of Parties. There is lack of clarity regarding the subject matter and the scope of the studies referred to in that Article'. Remember, this statement was made by India at the conference of plenipotentiaries after the Convention was adopted by consensus. This also shows inconsistency in the positions taken by the Indian govt at different multilateral environmental conferences, perhaps for good reason. It may further be noted that CBD is international law while the Rio Declaration is not. This again underlines the nature of the preambular reference in the Act to the Rio and Stockholm declaration as only inspirational.

15. Modern India's first environmental law – The Wildlife (Protection) Act- was enacted in 1972 barely a few months after the Stockholm Declaration in the June of that year. And India's prime minister herself attended the Summit and gave a memorable speech. Nevertheless, this statute does not allude to the Stockholm Declaration though it has been an inspiration in the enactment of the same. That again underscores that the Declaration was not legally binding unlike a treaty/convention.

The true meaning of Article 253

16. Let me quote the article here: 'Article 253 Legislation for giving effect to international *agreements*:

Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any *treaty, agreement or convention* with any other country or countries or any *decision* made at any international conference, association or other body'.

As explained in the foregoing, international treaties/conventions/agreements are legally binding on the Parties while Declarations and such are not so. In this Article the meaning of *decision* is the same as legally binding international instruments and not non-legally binding Declaration as the Rio or Stockholm declarations. This is underlined by the title of the article as well. Besides, fostering international '*law and treaty'* obligations (not of Declarations) of the State is underlined as a Directive Principle in Article 51.c and it is further emphasized by Article 73 that confers powers on the Union. Subsection 1.b of Article 73 reads as,' to the exercise of such rights, authority and jurisdiction as are exercisable by the government of India by virtue of any *treaty or agreement*'. Legally non-binding instruments like Declarations are not considered here and the meaning of 253 should be understood in its true meaning. If our country, or any country for that matter, is to turn all international declarations, decisions by meetings conducted by international conference of any type that will lead to a state of legislative anarchy. The outcomes of such events are, subject to national interest and resources, implemented through programs, projects or policy reforms by governments at various levels and other stakeholders, and not through legislation. Therefore the Green Tribunal Act's allusion to the Stockholm and Rio declarations does not cause the subject matter to be treated under entry no 13 of the Union List.

Environmental management/regulation versus compensation

17. The Cola company's Legal Opinion seeks to argue that the following statutes are also under Entry 13 of the Union List: The Air Act, 1981, The Envt Protection Act 1986 and the National Environment Tribunal 1995. Of these, it may be noted that the last has already been repealed by section 38.1 of the Green Tribunal Act in 2010, which the Legal Opinion fails to understand. As for the other two Acts they are dealing with issues of management and

regulation of the environment and do not deal with compensation for the consequences of environmental damage caused by an entity which is what the Plachimada Bill is addressing. Therefore this argument does not stand at all.

Groundwater, not surface water, is the issue

18. The Legal Opinion refers to a 1968 resolution the Kerala Assembly by which the State has authorized the Centre to pass legislation on issues related to water pollution and argues, therefore, that the state cannot create legislation of its own on this subject. Shri K KVenugopal gravely misses here the point that this resolution was about surface water and the Bill is about groundwater which is altogether different domain. I wonder how such a Legal Opinion could miss the more proximate fact of the enactment of an exclusive state legislation in 2002 on groundwater ie. the Kerala Ground Water (Control and Regulation) Act 2002, which is a confirmation that the state's right to enact legislation on groundwater has not been transferred to the centre. At Plachimada and therefore in the bill, the entire issue is about groundwater and the state Assembly is absolutely competent to enact this legislation. (I may add that I am an expert member of the Authority established by the said Groundwater Act, and further that the Planning Commission is currently formulating a new draft model bill for states on groundwater management).

Time bar of the Green Tribunal Act makes it irrelevant for Plachimada

19. The entire Legal Opinion is uninformed by the time bar provision contained in the Green Tribunal Act. Section 15.3 of the Act requires the petitions for compensation to be filed within a period of 5 years, with a grace period of 6 months. The most critical damages to groundwater and toxic contamination caused by the Cola company at Plachimada occurred during 2000-2004, way before the five year time bar set by the Act and therefore this Act cannot be used to redress the problem at Plachimada. And this is the reason why the Bill was passed by the Assembly. The Bill complements the central Act and does not in any was conflict with it.

Right to Life (Article 21), Polluter Pays Principle

20. The Kerala Bill is not an environmental legislation as such. It flows from the state's Constitutional responsibility to act upon the violation of the Article 21, interpreted in the Indian jurisprudence to include the fundamental right to wholesome environment, as for example in Subhash Kumar V. State of Bihar, 1991. As the HPC report has determined and as the Bill states at its outset that damages, on account of the Cola company's misdeeds, have been caused to human health, agriculture, labour (loss), groundwater, and to the social system of the village (None of these is a Union subject). And it is this this damage the Bill is seeking to compensate for. This is a fundamental Constitutional responsibility of the state government and has got nothing to do with any international declaration.

21. And the compensation provision is premised on the Polluter Pays Principle which has become an important part of Indian jurisprudence. This was upheld by the honourable Supreme Court in the Vellore Citizens' Welfare Forum V. Union of India (1996), among other cases. And it is based on this binding commitment that the state has passed the Bill for compensation to the Cola victims, and not based on any international declaration.

May I submit to you, honourable Minister, to respect the authority of the democratically elected Assembly to care for the welfare of its citizens, especially the poor and hapless, against a multinational giant who was once expelled from the country and who has scant regard for the country's laws and statutory bodies, and to forward the Bill to the President so that the Bill becomes law without further delay.

S.Faizi