



29 February 2024

Mr. Damilola S. Olawuyi

Chair-Rapporteur

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

Mr. Surya Deva

Special Rapporteur on the right to development

Mr. David R. Boyd

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

Mr. José Francisco Cali Tzay

Special Rapporteur on the rights of Indigenous Peoples

Dear Special Procedures Mandate Holders,

I refer to your Joint Communication, Reference: AL MYS 3/2023, dated 20 December 2023, regarding the adoption of the Nature Conservation Agreement (NCA) and the associated project in the territories of Sabah.

2. I hereby transmit in the **ANNEX** the response of the State Government of Sabah, on behalf of the Government of Malaysia, to the aforementioned matter.

3. I wish to extend my appreciation for your understanding and cooperation, and I sincerely hope that the attached response from the Government of Malaysia will be given full consideration.

Please accept the assurances of my highest consideration.

Thank you.

DATO NADZIRAH OSMAN
Ambassador/Permanent Representative

**RESPONSE FROM THE STATE GOVERNMENT OF SABAH, ON BEHALF OF
THE GOVERNMENT OF MALAYSIA TO THE JOINT COMMUNICATION
SUBMITTED BY 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 RIGHTS OF INDIGENOUS PEOPLES**

The Government of Malaysia ("Government") presents the following information provided by the State Government of Sabah, in response to the joint communication submitted by 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 rights of Indigenous Peoples, Reference: AL MYS 3/2023 dated 20 December 2023 ("Joint Communication") concerning the adoption of the Nature Conservation Agreement (NCA) and the associated project in the territories of Sabah.

2. The Sabah Government, with due respect to the various issues raised by the United Nations Human Rights Special Procedures, unequivocally state, that there was no mal-intent on the part of Sabah Government's intention in entering into a commercial agreement with a foreign company to act in a repressive manner in order to diminish the rights of the citizen of Sabah albeit native or non-native. In contrast, it is in the interest of the Sabah Government and mandated by its people to develop the State in the most appropriate manner. Context has to be given in order to clarify the rationale of the Sabah Government entering into such a contractual arrangement. Sabah, is a State, with an economy that is highly reliant on its primary resources, and yet, has aspirations for development that is to benefit the people of Sabah. This requires a delicate balance with measured risks and potential benefits, framed within the conditions of the governing laws of Sabah; and always ultimately for the mutual benefits of its socio-economic development.

3. As it was rightfully alluded to in the Joint Communication, the rights of natives has been enshrined since the preformation of Sabah as an independent State during its period under colonial administration. These rights under the Land Ordinance 1969, formally recognizes and aims to protect native tenure system as customary rights to the land and forest produce that are beyond the boundaries of gazetted forest reserves. However, within forest reserves that are constituted under the Forest Enactment 1968, admitted rights to access, use of forest produce and cultural sites, is safeguarded and defined through the gazette; during or post formation of a forest reserve. This is conducted through an enquiry process that is strongly resemblant to, and prior to the coining of the concept of Free, Prior and Informed Consent (FPIC). As for the matters of the Nature Conservation Agreement (NCA), it is principally encompassed within legally gazetted forest reserves, and not State lands or native land holdings; the arrangement of the Agreement should then be read within the framework of the Forest Enactment 1968, and the administrative requirements of such reserves by the Sabah Forestry Department.

4. Sabah has, to date, set aside 27.3% of its total land mass as Totally Protected Areas (TPAs), a sizeable area for longer-term conservation, far exceeding our national commitments, which is set aside for the benefit of the future generations of Sabah.

5. This, however, comes with an opportunity from a potential revenue source, which traditionally, the State acquired through timber royalties, which are then used for socio-economic development in the State; as well as to finance the management of our forests. The Sabah Government, through its commitment to expand total protection of terrestrial forests up to 30% by 2025, would see a further contraction in revenue, yet the costs to manage and protect such assets for the common good, shall continue to increase. Therefore, the Sabah Government regarded financing of conservation and socio-economic development from a non-invasive and non-controversial framework, such as the generation of emission reductions credits, was an admirable approach. This could partially finance our conservation activities, whilst providing and safeguarding the socio-economic development of native and non natives residing adjacent and within the protected areas.

6. As was clearly stated in the Joint Communication, the NCA underwritten by Hoch Standard Pte. Ltd. (HSPL) covenant was to commercialize the carbon and natural benefits within a defined area or designated area. There are two elements that are fundamental to the contractual obligation of both the Sabah Government and HSPL, which focus on the basic premise of the Agreement. The Project proponent has to show the viability of the project, through the commercialization of the Agreement; firstly carbon, and subsequently natural capital i.e., broadly ecosystem services. The Sabah Government, is fully aware that to trade in carbon credits, the proponents will have to adopt a recognized standard such as Verified Carbon Standard (VCS) or otherwise, in order to trade carbon credits. Therefore, the proponent **will** and **must** abide by the recognized methodologies and principles by the Standard. All Standards will insist on the premises of Free, Prior, and Informed Consent (FPIC) of those within and surrounding the designated area. Failure to comply with this requirement, will not see the acceptance of the Project; hence, its viability under a Standard. The Standard will itself, inadvertently, provide the necessary safeguards, to allow for mutual consent, and terms towards mutual benefits; and therefore, was not a necessary requirement to have been stated in the Agreement.

7. As the Agreement was commercial in nature, the proponent has to prove its economic potential and viability of the Project i.e., proof-of-concept, as a consequence of activities leading to emission reductions or avoidances over a baseline scenario. This, the Sabah Government understood, was not necessarily an easy task, given the designated areas were totally protected. The one hundred (100) years under the agreed terms of the Agreement, was to provide the potential for viability economically; although this was not a guarantee under any given Standard currently used for crediting purposes. The pretext of the Agreement requires the proponent to commercialize the 'potential' carbon credits, failing which the Sabah Government has the rights and obligation to terminate the Agreement.

8. As to the natural capital and ecosystems benefits underwritten in the Agreement, Sabah currently has no laws governing elements of natural capital for the provisioning of such resources. The laws have to be developed, which do not impinge on the basic rights of the people of Sabah to access such resources.

Therefore, the commercialization of the natural capital in the NCA was not likely to be implementable outside the ambit of the proper governing law, as the alternative would only be potentially feasible under a mutually agreed terms between parties; the provider of the resources and the beneficiaries. In Sabah, this is uncommon; as for example, access to clean water from forests for domestic use by rural communities is free, as Government determines these resources are the fundamental needs for basic human survival.

9. The Sabah Government, consequential to its obligation to the terms of the Agreement, shall provide to the proponent of the Project, to carry out its undertakings, areas of totally protected areas which are unencumbered. This meant, if rights to the use of a resource or whereby mutual agreement consenting to the acceptance of communities affected by such implementation of activities foreseen by the proponent, such areas shall as part of the Sabah Government's obligations, be severed from the Agreement. This mechanism in itself is meant to safeguard those who wishes to retain such rights to access the resources, and therefore, shall not form part of the Designated Areas under the NCA.

10. The NCA requires HSPL to draft and submit a Nature Conservation Management Plan (NCMP) to the Sabah Forestry Department (SFD) for approval before implementation. This would mean that SFD shall have supervisory and superintendence on the requirements and contents of the NCMP. Atypical to the formulation of such management plans, although not limited to, will require HSPL to conduct a comprehensive review of the resources within the Designated Areas. This would cover the forest resources and areas that are used by the communities that are living surrounding or within the forest reserves. HSPL will be compelled to consult those affiliated communities on the use of such forest resources, in order to develop the co-management plan for these areas, along agreed terms. However, if HSPL is unable to reach such an agreement, the Sabah Government shall be obliged to remove such areas under the terms and conditions of the NCA. This again is meant to safeguard the rights to use and access such resources from the forest reserves by the communities.

11. The NCA since its endorsement in 2021, has yet to come into full effect. The Sabah Government would like to inform the United Nations Human Rights Special Procedures that the NCA has been over the period under review, in order to refine various clauses and to severe erroneous clauses which has been deemed “lopsided”. This is anticipated to help resolve some of the issues raised with the implementation of the NCA and the subsequent concerns that had been articulated by civil societies and government agencies alike. The State Attorney-General’s Chambers has been firm and consistent in its manner, in holding back the full implementation of the NCA, pending the resolution of several queries and awaiting the necessary amendments to be made in the NCA.

State Government Of Sabah, on behalf of the Government Of Malaysia

26 February 2024