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HIGH COMMISSIONER FOR HUMAN RIGHTS

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the right to food; the Special Rapporteur on the rights of indigenous peoples; and the Special Rapporteur on the human right to safe drinking water and sanitation

REFERENCE: AL Business enterprises (2011) Food (2000-9) Indigenous (2001-8) Water (2008-1)
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Excellency,

We have the honour to address you in our capacities as Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on the right to food; Special Rapporteur on the rights of indigenous peoples; and Special Rapporteur on the human right to safe drinking water and sanitation pursuant to Human Rights Council resolutions 17/4, 22/9, 24/9, and 24/18.

As you know, the Human Rights Council expects us to communicate with Governments about issues that are brought to our attention by reliable sources of information concerning the situation of human rights that we are tasked to promote and to protect.

We wish to bring to the attention of your Excellency's Government information we received regarding the alleged impact of large-scale land acquisitions, under the Special Agricultural and Business Leases ('SABLs') scheme, on the rights of the indigenous communities of Papua New Guinea ('PNG'). In particular we wish to draw your attention to information received regarding the impact of these land acquisitions on the ability of indigenous populations to maintain customary land use patterns, sustain their traditional way of living, to access land and to secure their right to food and right to water. Similarly, we wish to draw attention on information alleging anomalies and human rights abuses in the process of leasing land for special agricultural and business activities.

According to the information we received:

Background

A pattern of large-scale land acquisition is occurring in many provinces of PNG, with reports of over 5.5 million hectares alienated in recent years, for 'special agriculture and business activities' through a legal mechanism known as the lease-leaseback scheme. Eighty-five percent of indigenous Papua New Guineans live in rural areas where a

majority depend on land for shelter, income and food access and on rivers and creeks for their freshwater needs. Underlying this dependence on agriculture is the land-ownership system and the constitutional acknowledgement of customary tenure.

In this context, indigenous communities of PNG have reportedly enjoyed continuous access to land for centuries under the customary tenure system. Customary landowners grow between 30 and 80 species of food crops including vegetables, root vegetables, fruits, nuts, cane and cereals. This diversity ensures a high level of food security and a nutritious diet for local households. It is reported that local agriculture copes relatively well with periods of rain or drought, and allows a sustainable use of the land through traditional practices such as letting the land lie fallow. Smallholders' agriculture is also said to maintain trade and exchanges between rural communities and with urban centres, thus sustaining food security throughout PNG's territory. Additionally, according to reports received, indigenous communities rely on forest areas to collect plants for cooking, remedies, tools, textiles, cords, artwork and so on.

The Constitution provides specific protection from unjust deprivation of property and customary land (article 53). The Land Act 1996, however, allows long-term leases to be issued by the Government to non-indigenous companies. While the primary intention of the Land Act is "to assist or encourage Papua New Guinean [Landowners] to develop & utilize their own land," the law also allows the State to lease the land to an entity "to whom the customary landowners have agreed that such a lease should be granted." When the State is to use that latter option, it issues a 'Special Agricultural Business Lease' or SABL.

In 2011, the then Acting Prime Minister created a national Commission of Inquiry on SABLs, with the instruction to inquire into specific SABLs. Also in 2011, a moratorium was imposed on the issuing of new SABLs until the Commission of Inquiry presented its final report to Parliament. In its final report of 24 June 2013, the Commission of Inquiry estimated that more than 400 SABL had been issued over customary land since the early 1980s. Taken together, the areas now held under SABLs reportedly represent over twelve percent of PNG's territory and have reduced from ninety-seven to eighty-six percent the amount of land held under customary ownership in the country. The inquiry found that 58 out of 75 SABLs were sub-leases to developers for 99 years leaving no residual rights to the landowners.

In its final report, the Commission of Inquiry recommended that "the current SABL setup be done away [with] entirely". Having "carefully considered the option of retaining the SABL setup as an optional method for availing customary land for national development", the Commission concluded that "the inherent risks associated with the option are unacceptable because we believe any reforms to the law or process may not satisfactorily remove the loop holes, inadequacies or permissive ambiguities that are being used to abuse the SABL process and hijack land use after SABLs are granted."

This conclusion was reportedly supported by the Prime Minister Hon. Peter O'Neill in a statement of 18 September 2013, in which he noted that the final report of

the Commission of Inquiry revealed “a shocking trend of mismanagement and corruption in all stages in the process” and that the only conclusion he could draw was “that the policy on SABLs has failed miserably”. In this regard, the Prime Minister reported announced “that the Minister for Lands and Physical Planning will be appointing a Task Force to identify a new legislative framework to provide for the conversion of customary land into lease hold land for the benefit of landowners, protect the interests of landowners and ensure sustainable land use.”

In addition, concerns have been raised about PNG’s land development policy, which as described in the Medium Term Development Plan 2011-2015, is to ensure that “land is sufficiently unlocked for development”, with stated alienation targets, including having 20% of customary land alienated by 2030. Concerns have been expressed that such a land policy seems to contradict the principles of PNG’s constitution itself, which strongly protects access to land, and set self-reliance and sustainable management of natural resources as key principles. Therefore, while these notions are recognized as key conditions for sustainable development and the realization of the right to food, it is alleged that the Medium Term Development Plan targets are likely to threaten such goals.

As detailed further below, a number of human rights concerns have been raised with respect to the SABL, including with respect to the environment and effects on indigenous communities’ livelihoods; with respect to the lack of consultation and consent and alleged fraud and misrepresentation in the process of issuing SABLs; and with respect to situations of violence or intimidation against landowners that express opposition to the SABLs.

Case studies

Bearing in mind that situations in the Pomio and Turubu areas represent only a sample of the information we received about land leases, we nonetheless develop these examples to further illustrate the claims that have been made to our mandates. We note that the report of the Commission of Inquiry of 24 June 2013 presents more detailed findings about the conditions in which seventy-five concessions were granted throughout PNG’s territory.

According to reports, an umbrella landowner company, Memalo Holding Limited, that incorporates five individual landowner companies Unung-Sigite Limited, Pomata Limited, Ralopal Investment Limited, Nakiura Investment Limited and Rera-Holdings Limited has concluded five SABLs in the district of Pomio in the south-eastern coast of East New Britain Province. The portions of customary land (27C, 196C, 197C, 198C and 2C) leased under the five SABLs are property of indigenous communities. For instance, the villages of Mu, Kaiton, Totongpal, Manginuna, Malmal-Talie, PororSalel and Gugulena are the customary owners of the land under the Pomata concession and the villages of Mauna, Lau and Bairamanown the Ralopal concession. Reports received highlight that villagers did not agree to the SABLs, and that the landowner companies were essentially composed of a few individuals who were not mandated to speak on behalf of local communities.

As regards the concessions of Pomata and Ralopal, reports state that the SABLs signed in 2008 involved flawed Land Investigation Reports, which did not accurately define the concessions' boundaries (a proper survey to determine those boundaries was never conducted in the area) and collected fake signatures (the Land Investigation Reports included signatures with names of children and infants). Information indicates that SABLs' sublease was granted to the logging company Gilford Limited, subsidiary of the Malaysian company Rimbunan Hijau, for a period of 60 years with a further 30-year option. Reports specify that the sublease contract does not include any provision for assistance to indigenous communities beyond timber royalties, which are expected to end within four years. Additionally, if landowners wish to terminate the lease they must compensate Gilford Limited for the cost of its investments in the land, which Commissioner Alois Jerewai, Head of the Commission of Inquiry, reportedly estimated up to K10 billion (\$5 billion). Information received finally points out a clause stating that if landowners cannot pay such compensation, Gilford Limited could refer to the court to stop the landowners from breaking the sublease.

According to the information received, the dispute concerning the SABLs in Pomio District reached a turning point when Gilford Limited received a Forest Clearing Authorization in 2009 and landed its machines in the Drina Plantation of West Pomio in 2010. The traditional clan groups reportedly filed various judicial recourses and carried out peaceful actions to protest against the use of their land for logging and oil palm development. Information mentions subsequent involvement of State administration and police task force in the conflict, in support of Gilford Limited. According to information, villagers who had cut down trees across a road or stream to stop logging and to protect drinking water were subject to beatings with sticks, rifle butts and fan belts by the police's riot squad. It is reported that on one occasion, in October 2011, opponents of the logging company were locked for several consecutive nights in iron shipping containers with no ventilation, temperature control or toilet facilities. Information also indicates that police staff received housing and money from Gilford Limited. In April 2012, the police reportedly still had four to five staff members permanently based in the Malaysian logging company's camp in Drina Plantation. Finally, information similarly incriminates the leading personnel in the district government and the local government councils for corruption and collusion with the private company.

Other examples of SABLs that have been brought to our attention include Turubu, in the Province of East Sepik. This province was allegedly one of the first areas of PNG to have SABLs on its territory. The area is known for its richness in Kwila trees, whose wood is rare and highly valued on the logging market. In the area of Turubu, the landowner company Limawo Holdings reportedly subleased 116,840 hectares of land (portion 144C) to Sepik Oil Palm Limited. According to information, the developer company Wewak Agriculture Limited obtained a FCA in March 2009 and started large-scale logging operations on 13 July 2009. Significant conflict reportedly arose around the Turubu SABL, with landowners of the villages of Tring, Yulao, Kamasau, Murai Suanum, Munjun, Taul, Mundawin, Bungain and Kep claiming not to be duly represented by the Limawo Holdings landowner company. Various complaints reported that limited

information was given about the project and about its impact on the landowners' livelihoods. Furthermore, information received explains that landowners were misinformed about the size of the project. The Limawo Holdings landowner company reportedly combined the lands of 56 Incorporated Land Groups, while many of the landowners who regrouped in these Incorporated Land Groups were willing to be out-growers of oil palm and did not want to be regarded as part of the larger SABL. The surface leased includes gardens, crops and houses belonging to local landowners, essential assets and resources that they never agreed to lease.

Critical grievances and tensions described about the Turubu SABL concern the logging activities of the developer company. For instance, reports highlight that Wewak Agriculture Limited asked for an extension of its clearing plans in 2010 although it was not willing to plant on most of the cleared areas. After inspection of the area, the Commission of Inquiry reportedly found "developers engaged in full scale logging operations, but 'forgetting' (sic) about agricultural component which is the sole reason why they were granted SABLs". It is also reported that villagers protested against the company because it continued logging after the road leading to the oil palm plantation had been constructed. Furthermore, information received accuses the company of bribing both governmental administration (provincial administration and officials of the Department of Environment and Conservation) and state police. Further, as in the case of Pomio, the police task force is reportedly accused of collusion with the company, beatings and arbitrary detention of the opponents to the logging activities.

Human Rights Concerns

Environmental impact and effects on the traditional livelihoods of indigenous communities

PNG's forests are the world's third largest, and sustain both rich ecosystems and diverse populations. Information received gives substantial evidence that current levels of logging in PNG are unsustainable. Logging operations are reported to have already cleared large areas of Papua New Guinean forests with direct consequence on biodiversity and on local communities' access to traditional forest resources.

The choice of land leased for agriculture and business activities has also been raised as an environmental concern. Allegations have been made that SABLs overlapped with protected areas and on-going eco-forestry projects. In the case of Pomio District, information discloses that SABLs threaten active eco-forestry programmes, which involved employment of indigenous populations, had been approved by the PNG Forest Authority and financed by the European Union funded PNG Eco-forestry programme.

Reports received suggest that business and agriculture activities also have significant impact on the quality of water sources on which indigenous villages depend for their consumption and farming. These allegations have been made where industrial oil palm plantation, requiring large volumes of synthetic fertilizer and pesticides, have developed. Further, reports received raise the concern that palm oil is a crop that cannot

be co-planted, and that it therefore reduces drastically the diversity and sustainability of cultures, depleting the soil of the nutrients that ensure its fertility.

As for the logging activities, they have reportedly expanded without meeting the country's legal requirements. Information received included results from a review of logging industry commissioned by the Government, whose findings showed that out of fourteen logging operations – including the five largest – none were defined as legal, and only one operation met more than fifty percent of key criteria for lawful logging operations.

On another note, the Commission of Inquiry observed that although some logging contracts contain clauses for profit sharing, historically very few foreign-owned companies declare profits in PNG. Also, infrastructures built in the course of logging projects were reportedly left unmaintained after the end of the business activities. Finally, design of wider and longer road tracks on plantation sites is alleged to incorporate inflated amounts of tropical hardwoods. As a result of the logging industry's flaws, information received points out that resources are taken away from local populations without resulting in development outcomes for the country. Therefore, concerns are raised about the ability of PNG population to enjoy its right to development.

Concerns have also been raised that environmental cost of the logging operations and agribusiness activities, at the scale where they are developed under the SABL scheme, will have lasting impacts on the ability of local communities to maintain their food supplies, their traditions and culture in the future.

Lack of consultation, corruption and fraud

A number of SABLs have been issued without consulting with or obtaining the consent of customary land owners, and landowners' agreement to the leases has reportedly been uniformed, manipulated and falsified. This is despite provisions of the Land Act 1996, which specifies a formal procedure for the granting SABL subleases, involving first the consent of original owners for the initial lease to the Government, and second the owners' consent for the subsequent lease by the Government to a third party. However, only four of the SABLs examined by the Commission of Inquiry had the consent of local landowners.

First, allegations provided suggest that affected indigenous communities have very little knowledge of legal procedures and land acquisition contracts. In the case of West Pomio, the villagers have reportedly found out about the existence of the SABL scheme after their land was already subleased to a third party. In the case of Turubu, villagers were allegedly not aware of the function of the ILGs, and of their incorporation in the Limawo Holdings landowner company.

Second, reports suggest that Government administration and private companies did not truly engage affected communities in negotiation processes, and that landowner companies were often composed of few individuals with no mandate to speak on the

behalf of entire communities. According to information received this resulted in the signing of deals that were largely unfavourable to indigenous communities, but which sometimes benefited the few individuals who had participated to the negotiation.

Third, reports charge Government authorities with failures in meeting land administration duties and with a lack of transparency in their work. In particular, reports charge the Department of Lands and Physical Planning with failing in various duties such as demanding registration of subleases, demanding development plans, providing complete Land Investigation Reports and accurate surveying, demanding certificates of alienability, ensuring public disclosure of land deals, ensuring absence of conflict of interest. Information received also shows that Land Investigation Reports produced fake documents and signatures.

In this regard, the Commission of Inquiry has expressed concern about fraud in land alienation procedures. It found instances where consent of landowners for SABL titles to be issued directly to foreign owned companies were obtained fraudulently through misrepresentation, so that landowners were not aware that their consent had been obtained to approve the granting of an SABL over their customary land to particular entities or groups. The Commission of Inquiry recommended in its final report to take steps to ensure that irregularly or illegally alienated land will be returned to the local landowners and to prosecute all persons and entities implicated in unlawful activities.

Violence and intimidation

Information received asserts that arbitrary detention and physical brutality by police against landowners were repeatedly witnessed on sites where customary owners protested against alienation of their land for agriculture and business purposes. Accusations of beatings, abuses, torching of crops and houses appear in documents received. There have also been reports that police officers and private companies have engaged in corrupt practises. In some cases it is alleged that a police task force was implicated in obtaining customary landowners' signatures for official leasing papers. Further, logging companies reportedly provide local police officers with transport, accommodation, and allowances in exchange for protection for their projects. In response to a series of cases of abuse of power and violence against locals, we were informed that the police commissioner Tomai Kulunga, in December 2011, ordered the withdrawal of all police officers from logging sites across the country. However, police were reported back at some logging sites only a few months later.

While we do not wish to prejudge the accuracy of information received, we would like to draw the attention of your Excellency's Government to the applicable international human right norms and standards and, in particular, the following:

With respect to the right to food, article 25 of the Universal Declaration of Human Rights 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." Furthermore article 11.1 of

the International Covenant on Economic, Social and Cultural Rights (ICESCR) – which Papua New Guinea ratified on 21 July 2008 – stipulates that States “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”, and requires them to “take appropriate steps to ensure the realization of this right.”

The Committee on Economic, Social and Cultural Rights, which monitors the implementation of the Covenant, has defined the core content of the right to food in its General Comment No. 12, along with the corresponding obligations of States to respect, protect and fulfill the right to food. The Committee considers that the core content of the right to adequate food implies, inter alia, availability of food which refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand, and accessibility of food which encompasses both economic and physical accessibility. The obligation to respect existing access to adequate food requires States parties not to take any measure that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfill (facilitate) means the State must pro-actively engage in activities intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfill (provide) that right directly.

The Committee notes that especially disadvantaged groups may need special attention and sometimes priority consideration with respect to accessibility of food. The Committee make special note of socially vulnerable groups such as indigenous population groups whose access to their ancestral lands may be threatened, as segment of the population who may need specific attention from governments.

The right to adequate food is recognized also in the Convention on the Rights of the Child – ratified by Papua New Guinea on 2 March of 1993 – in article 24.2(c) and article 27.3. In the Convention, the right to adequate food is to be read in conjunction with the right to life, survival and development stipulated at article 6. States parties to the Convention on the Right of the Child commit themselves to combat “disease and malnutrition, including within the framework of primary health care, through, inter alia, (...) the provision of adequate nutritious foods and clean drinking water.”

The right to adequate food may be under severe threat when land on which people depend for their subsistence is traded away, for instance for the development of large-scale agricultural projects. This is why the Special Rapporteur on the right to food has considered it necessary to restate the human rights obligations of States in this regard in a set of minimum principles and measures to address the human rights challenge, presented as an addendum to the annual report to the annual report of the Special

Rapporteur on the Right to Food to the Human Rights Council, at its 13th session (March 2010) (A/HRC/13/33/Add.2).

With respect to the human right to safe drinking water and sanitation, we would like to remind your Excellency's Government that ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women (ratified by Papua New Guinea on 12 Jan 1995) and the Convention of the Rights of the Child (ratified by Papua New Guinea on 1 March 1993) entail human rights obligations attached to access to safe drinking water and sanitation. In 2010, the UN General Assembly (resolution 64/292) and the Human Rights Council (resolution 15/9) explicitly recognized the human right to water and sanitation. In its General Comment No. 15, the Committee on Economic, Social and Cultural Rights clarified that the human right to water means that everyone is entitled to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses, which includes sanitation. The human right to sanitation means that everyone, without discrimination, has physical and affordable access to sanitation, in all spheres of life, which is safe, hygienic, secure, socially and culturally acceptable, provides privacy and ensures dignity.

Further the Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on 13 September 2007, provides in its article 8(2)(b) that States should prohibit 'any action which has the aim or effect of dispossessing [indigenous peoples] of their lands, territories or resources'. . ." The Declaration affirms indigenous peoples' rights to the lands, territories and resources that they traditionally owned, occupied or otherwise use or acquired, and for States to give legal recognition to those lands, territories and resources with due respect to their customs, traditions and land tenure systems, *art. 26*. Article 32, provides for the right of indigenous peoples to be consulted "through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploration of mineral, water or other resources." In addition, article 28 provides for the right to redress, including restitution, or if not possible, just, fair and equitable compensation for the traditional lands and resources of indigenous peoples that have been "confiscated, taken, occupied, used or damaged without their free, prior and informed consent". That compensation may include "lands, territories and resources equal in quality, size and legal status or of monetary compensation or of other appropriate redress".

Furthermore, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises would like to draw the attention of your Excellency's Government to the Guiding Principles on Business and Human Rights, which were endorsed by the Human Rights Council in its resolution 17/4 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;

- c) “The need for rights and obligations to be matched to appropriate and effective remedies when breached.”

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. Since we are expected to report on these cases to the Council, we would be grateful for your cooperation and your observations on the following matters:

1. Are the facts summarized above accurate?
2. To what extent did the Government ensure that information about the legislation applicable in PNG and about land leases’ negotiation was publicly disclosed and made available in order to allow for an appropriate assessment of the rights of the customary landowners and indigenous communities?
3. What measures have been put in place to ensure consultations, aimed at obtaining the free, prior and informed consent of affected indigenous communities, with regard to the process of leasing customary land to private investors and the impacts those leases may have on their traditional lands and natural resources?
4. To what extent did the Government verify that individual members of the landowners companies were duly mandated to speak on behalf of indigenous communities?
5. Have all complaints by indigenous communities and customary landowners been duly examined through fair and equitable judicial processes?
6. To what extent has the Government followed the recommendations of the Commission of Inquiry final report to take steps to ensure that irregularly or illegally alienated land will be returned to the local landowners and to prosecute all persons and entities implicated in unlawful activities?
7. What measures have been put in place to ensure the number and extent of the SABL subleases do not have disproportionate negative impacts on PNG’s environment and on the livelihoods of local communities?
8. Did the Government conduct studies to evaluate compensations owed to communities per hectare of customary land alienated? If so, did the studies incorporate the value of food, housing, forest use in the compensation price? We would be grateful if we could be provided with the details, date and outcome of such studies.
9. To what extent have measures of compensation been verified by the government administration? What actions have been taken to ensure that those who may lose their customary right over land are offered alternative sustainable means to access sufficient and adequate food, or lands and resources equal in quality, size, and legal status, monetary compensation or other appropriate redress?

10. After the withdrawal and subsequent return of the police forces on the logging and plantations site in 2011, did the government take any measure to survey and improve police practices on logging sites?

11. Has the Government conducted an independent evaluation of the practices of the Department of Lands and Physical Planning in issuing SABLs? Were the other implementing agencies (Department of Agriculture and Livestock; Department of Environment and Conservation; PNG Forest Authority; Investment Promotion Authority) surveyed? We would be grateful if we could be provided with the details, date and outcome of any such evaluations.

12. How does your Excellency's Government plan to respond to the conclusions of the Commission of Inquiry on SABLs, particularly to its recommendation to suppress entirely the SABL scheme?

13. What is the role of the Task Force to be appointed by the Minister for Lands and Physical Planning to identify a new legislative framework to better protect the interests of landowners and ensure sustainable land use, and to what extent will such new legislative framework be developed through inclusive public consultations?

14. Has your Excellency's Government taken steps to set-up new development policies that promote food security and sustainable development without taking land away from customary owners?

15. What is your Excellency's Government doing to implement the UN Guiding Principles on Business and Human Rights? Is there a process to examine collective and cumulative impacts by business enterprises?

16. Which business enterprises are involved in the different cases cited in this letter?

17. Has the Government enquired with the business enterprises about their due diligence in order that the different companies identify, prevent, mitigate and account for how they address their adverse human rights impacts?

18. What steps is the Government taking to ensure that victims have access to effective remedy?

We would be most grateful to receive an answer within 60 days. We undertake to ensure that the response of your Excellency's Government will be taken into account in our assessment of the situation and in developing any recommendations that we may make for your Excellency's Government's consideration pursuant to the terms of our respective mandates. Additionally, we undertake to ensure the response of your Excellency's Government is accurately reflected in the reports we will submit to the Human Rights Council for its consideration.

Please accept, Excellency, the assurance of our highest consideration.

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