

Mandates of the Special Rapporteur on the situation of human rights defenders; the Working Group on the issue of human rights and transnational corporations and other business enterprises and the Special Rapporteur on the rights of indigenous peoples

Ref.: AL MYS 2/2022
(Please use this reference in your reply)

29 August 2022

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the situation of human rights defenders; Working Group on the issue of human rights and transnational corporations and other business enterprises and Special Rapporteur on the rights of indigenous peoples, pursuant to Human Rights Council resolutions 43/16, 44/15 and 42/20.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning an **alleged strategic lawsuit against public participation launched against the human rights organisation SAVE Rivers**.

SAVE Rivers is a grassroots NGO based in Sarawak, Borneo. Since 2011, they have been working with rural communities to protect land, rivers and watersheds from environmental damage, as well as to prevent damage to biodiversity and support indigenous peoples in the defence of their rights. They promote sustainable development and community-led conservation efforts. Messrs. Peter Kallang, Mark Bujang, Thomas Jalong Apoi and Ms. Caroline Mbang Nyurang are Directors of the organisation.

According to the information received:

Samling Plywood (MIRI) SDN BHD and Samling Plywood (BARAMAS) SDN BHD are private limited companies incorporated in Malaysia. Their business is the extraction and sale of timber and the manufacture of plywood. Both ultimately form part of the Samling Group of Companies. On 2 July 2021, the two companies submitted a claim to the High Court of Sabah and Sarawak at Miri for loss and damage resulting from alleged defamatory statements made against them by SAVE Rivers. The plaintiffs claimed that seven articles published by the NGO on its website between 23 June 2020 and 10 March 2021 had affected their business and commercial relationships.

In the articles in question, SAVE Rivers reported on concerns of members of indigenous people's communities affected by the Gerenai Forest Management Unit (FMU), a 148,000 hectare logging concession awarded to the Samling Group in the rural Baram region of Sarawak, and promoted an online petition calling for a halt to the project. The concerns relayed in the articles related to the certification granted to the project under the Malaysian Timber Certification Scheme (MTCS), a process operated by the Malaysian Timber Certification Council (MTCC) and endorsed by the Programme for the Endorsement of Forest Certification (PECF), an influential international certification body. The articles reported indigenous people's community concerns that the certification process

for the FMU had been rushed through while restrictions were in place to combat the Covid-19 pandemic, and that any consultation undertaken had been inadequate to offer an authentic opportunity for indigenous people's communities to give or withhold their free, prior, informed consent. They further elaborated concerns that indigenous people's communities opposed to logging had been excluded from the consultation process entirely, that the complaints system under the MTCS was opaque, ineffective and disempowering, and that the Samling companies had been engaging in illegal logging in the communities.

In filing their claim, the companies requested general damages of RM 5,000,000 (approx. 1.12 million USD as of August 2022), aggravated damages to be assessed by the court, and an order for the defendants to retract the articles in question and publish an apology approved by the companies. The companies also sought an injunction restraining SAVE Rivers from publishing any similar statements concerning them in the future, along with legal costs. The case is expected to come to court in 2022.

As a result of the action filed by the companies, the dispute resolution process within the MTCC, activated in May 2021 after a complaint was made by the indigenous people's communities, stalled. In August 2021, the MTCC's Dispute Resolution Committee informed the indigenous peoples that they were unable to deliberate on the substantial detail of the case as a result of the companies' legal claim, due to the perceived risk of being deemed to interfere with the lawsuit. In October 2021, the indigenous people's communities submitted a formal complaint to the PEFC, however, the umbrella-body cited the unfinished investigation of the MTCC as a barrier to it carrying out its own investigation into the case.

Without wishing to prejudge the accuracy of the information received, we express our concern that the legal action brought against SAVE Rivers by the companies may amount to an instance of strategic litigation against public participation, also known as a SLAPP. Such manifestly unfounded lawsuits are typically launched by private actors against human rights defenders and others who exercise their right to freedom of expression to raise concerns about corporate activities. The purpose in such cases is to silence criticism and deter future opposition to a company's projects through intimidation. Where such suits occur, businesses exploit the power imbalances that exist between companies and human rights defenders, leaning in particular on the substantial financial disparities between the parties, given the costs of fighting such cases in court and the size of the damages often sought.

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.

As 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, we would 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 information as to any steps taken by your Excellency's Government to protect human rights defenders and others from unfounded lawsuits aimed at deterring public participation.
3. Please indicate what steps your Excellency's Government has taken or is considering to take to protect against human rights abuses by business enterprises under its jurisdiction, including to protect human rights defenders speaking up about adverse business impacts on human rights, in accordance with the UN Guiding Principles on Business and Human Rights.
4. Please provide information on any steps taken by your Excellency's Government to ensure that the affected communities, including Indigenous Peoples as well as human rights defenders in your territory and/or jurisdiction, have access to effective, adequate and timely remedies and compensation for development and business-related human rights abuses.
5. Please provide information regarding the progress in the development of a National Action Plan on Business and Human Rights by your Excellency's Government and the adoption of measures, including a specific law, to protect against strategic lawsuits against public participation (anti-SLAPP measures), that would contribute to the non-repetition of similar instances.
6. Please, provide information on the consultations undertaken to seek the free, prior and informed consent of indigenous people's and to include them in the decision-making on the projects affecting them.

We would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we 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.

We would like to inform you that a communication concerning the above-mentioned allegation has also been sent to the Samling Plywood Group.

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

Mary Lawlor
Special Rapporteur on the situation of human rights defenders

Fernanda Hopenhaym
Chair-Rapporteur of the Working Group on the issue of human rights and
transnational corporations and other business enterprises

José Francisco Cali Tzay
Special Rapporteur on the rights of indigenous peoples

Annex

Reference to international human rights law

In connection with the above alleged facts and concerns, we would like to refer your Excellency's Government to article 19 of the Universal Declaration, which states that everyone has the right to freedom of opinion and expression, and underlines that this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. We would also like to recall Human Rights Council resolution 44/12, adopted by consensus in June 2020, which reaffirms that freedom of expression is a human right guaranteed to all, acknowledges the responsibility of businesses to respect human rights, and calls on States to promote, protect, respect and ensure the full enjoyment of the right to freedom of expression.

We would also like to draw the attention of your Excellency's Government to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, otherwise known as the UN Declaration on Human Rights Defenders, which was adopted by consensus at the UN General Assembly in 1998. In particular we would like to highlight articles 1 and 2 of the Declaration, which state that everyone, individually and in association with others, has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms and that each State has a prime responsibility and duty to promote, protect and implement all human rights and fundamental freedoms. Further to these, we would also like to reference as article 6 (a) of the Declaration, which provides for the right to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, and article 12, paragraphs 2 and 3, which provide that the State shall take all necessary measures to ensure the protection of everyone against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration.

In addition, we would like to highlight the UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in 2007 with the positive vote of Malaysia. In particular, we would like to highlight article 3, which states that indigenous peoples have the right to self-determination, by which they may freely determine their political status and freely pursue their economic, social and cultural development. We would also like to refer to article 8(2)(b), which holds that the State shall provide redress for any action which has the aim or effect of dispossessing indigenous peoples or individuals of their lands, territories or resources. Finally, we would like to underline article 19, which holds that States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them, and article 26, which states that Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

Furthermore, we would like to highlight the UN Guiding Principles on Business and Human Rights, which were unanimously endorsed in 2011 by the Human Rights Council in its resolution (A/HRC/RES/17/31) following years of consultations with

Governments, civil society and the business community. The Guiding Principles have been established as the authoritative global standard for all States and business enterprises with regard to preventing and addressing adverse business-related human rights impacts. 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 or 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 a recognized principle that States must protect against human rights abuses by business enterprises within their territory. As part of their duty to protect against business-related human rights abuse, States are required to take appropriate steps to “prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication” (Guiding Principle 1). This requires States to “state clearly that all companies domiciled within their territory and/or jurisdiction are expected to respect human rights in all their activities” (Guiding Principle 2). In addition, States should “enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights...” (Guiding Principle 3). 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 occur. 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 to which it contributes. 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).

The Guiding Principles also recognise the important and valuable role played by independent civil society organisations and human rights defenders. In particular,

Principle 18 underlines the essential role of civil society and human rights defenders in helping to identify potential adverse business-related human rights impacts. The Commentary to Principle 26 underlines how States, in order to ensure access to remedy, should make sure that the legitimate activities of human rights defenders are not obstructed.

Finally, we would like to refer your Excellency's Government to the Working Group's report on human rights defenders and the civic space (A/HRC/47/39/Add.2), which highlights the need for addressing the adverse impact of business activities on human rights defenders. It unpacks the normative and practical implications of the Guiding Principles on Business and Human Rights for States and business in relation to protecting and respecting the vital work of human rights defenders.