

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 OTH 83/2022
(Please use this reference in your reply)

29 August 2022

Dear Mr. Chia and Mr. Cho,

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 your attention information we have received concerning an **alleged strategic lawsuit against public participation launched against the human rights organisation SAVE Rivers**.

We are independent human rights experts appointed and mandated by the United Nations Human Rights Council to report and advise on human rights issues from a thematic or country-specific perspective. We are sending this letter under the communications procedure of the Special Procedures of the United Nations Human Rights Council to seek clarification on information we have received.

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

Samling Group

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 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 indigenous people's communities.

In filing their claim, the companies requested general damages of RM 5,000,000 (approx. 1.13 million USD as of June 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, has stalled. In August 2021, the MTCC's Dispute Resolution Committee informed the indigenous people's communities 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 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 companies within your conglomerate may amount to strategic litigation against publication participation, also known as a SLAPP. Such 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 the measures put in place by your company to ensure that it respects human rights, in line with the corporate responsibility to respect outlined in the UN Guiding Principles on Business and Human Rights. In particular, please provide details on the human rights due diligence processes put in place by the Samling Group of Companies in line with Guiding Principles 17 – 21.
3. Please explain how the lawsuits filed by the Samling Group against SAVE Rivers are compatible with the company's responsibility to protect freedom of expression and the work of human rights defenders under the UN Guiding Principles on Business and Human Rights.
4. Please provide information about specific due diligence or impact assessment measures taken by your company concerning the development of projects by the Gerenai Forest Management Unit. In particular, please highlight how your company conducted meaningful consultation with the affected stakeholders, specifically with the indigenous community members affected by the Gerenai Forest Management Unit. Please also indicate whether any steps were taken to avoid negative social, cultural and environmental impacts on the communities located in the area of the project, including by seeking their free, prior and informed consent for the project on their lands. If no consultations or dialogues were initiated, please explain why.
5. Please provide information on the measures taken or to be taken by your company to provide for, or contribute to providing effective remedies for any adverse impact your activities may have on the human rights and fundamental freedoms of human rights defenders. This may include establishing or participating in effective operational-level grievance mechanisms.
6. Please provide specific details on the measures taken to ensure meaningful consultation with potentially affected groups and other relevant stakeholders, including human rights defenders and indigenous peoples, in the context of human rights due diligence carried out in the context of the Gerenai Forest Management Unit.

We would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your company 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.

Please note that a letter expressing similar concerns had been sent to the Government of Malaysia.

Please accept, Mr. Chia and Mr. Cho, 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 first like to draw your attention to the United Nations Guiding Principles on Business and Human Rights (A/HRC/17/31). The Guiding Principles were unanimously adopted by the Human Rights Council in 2011, through resolution A/HRC/RES/17/31, after years of consultations between participating governments, civil society and the business community. These Guiding Principles are based on the recognition of:

- a) The existing obligations of States to respect, protect and fulfill human rights and fundamental freedoms;
- b) The role of business as a specialised organ of society that performs specialised functions and must comply with all applicable laws and respect human rights;
- c) The need for rights and obligations to be accompanied by adequate and effective remedies in the event of non-compliance".

The Guiding Principles are the authoritative global standard for business to prevent and address business-related adverse human rights impacts. The responsibility to respect human rights constitutes a global standard of conduct applicable to all businesses, transnational and otherwise, regardless of their size, sector, location, ownership and structure. It exists irrespective of the capacity and/or willingness of States to meet their own human rights obligations and does not diminish those obligations. It is a responsibility additional to that of complying with national laws and standards for the protection of human rights.

The Guiding Principles identify two main components of the corporate responsibility to respect human rights, which require that "enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities and address those impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts directly related to operations, products or services provided through their business relationships, even where they have not contributed to those impacts" (Guiding Principle 13).

To meet their responsibility to respect human rights, enterprises should have policies and procedures that are appropriate to their size and circumstances, including:

- a) "A policy commitment to meet their responsibility to respect human rights;
- b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute." (Guiding Principle 15)

Furthermore, Principle 22 states that if companies "identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their

remediation through legitimate processes."

Furthermore, we would like to note that as set forth in the United Nations Guiding Principles on Business and Human Rights, all business enterprises have a responsibility to respect human rights, which requires them to avoid infringing on the human rights of others to address adverse human rights impacts with which they are involved. The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. Moreover, it exists over and above compliance with national laws and regulations protecting human rights.

Guiding Principles 11 to 24 and Principles 29 to 31 provide guidance to business enterprises on how to meet their responsibility to respect human rights and to provide for remedies when they have caused or contributed to adverse impacts. Moreover, the commentary of Principle 11 states that "business enterprises should not undermine States' abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes". The commentary of Guiding Principle 13 notes that business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties. [...] Business enterprise's "activities" are understood to include both actions and omissions; and its "business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services".

Principles 17-21 lays down the four-step human rights due diligence process that all business enterprises should take to identify, prevent, mitigate, and account for how they address their adverse human rights impacts. Principle 22 further provides that when "business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes".

Furthermore, business enterprises should remedy any actual adverse impact that they cause or to which they contribute. "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.

We would like to also refer you to the [Working Group's Guidance on ensuring respect for human rights defenders](#). The Report on human rights defenders and civic

space – the business and human rights dimension (A/HRC/47/39/Add.2), highlights the need for addressing the adverse impact of business activities on human rights defenders. It unpacks for States and business the normative and practical implications of the Guiding Principles on Business and Human Rights in relation to protecting and respecting the vital work of human rights defenders.

In view of the above, we would like to refer to the International Covenant on Civil and Political Rights, in particular to its article 19 of the International Covenant on Civil and Political Rights (ICCPR) which enshrines the right to freedom of opinion and expression. This includes the right to seek, receive and impart information and ideas of all kinds, and is subject to restriction only in limited circumstances conforming to the strict tests of necessity and proportionality. In this regard, 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 and acknowledges the responsibility of businesses to respect human rights.

We would also like to refer to the fundamental norms set out in the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, otherwise known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to article 1 of the Declaration, which states that everyone has the right to promote and to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels.

In addition, we would like to highlight the UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in 2007. 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 finally like to refer to article 26 of the Declaration, 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.