

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 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

Ref.: AL OTH 142/2023

(Please use this reference in your reply)

20 December 2023

Mr. Choon-Hou Ho,

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 development; Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment and Special Rapporteur on the rights of Indigenous Peoples, pursuant to Human Rights Council resolutions 53/3, 51/7, 46/7 and 51/16.

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 part of the special procedures system of the United Nations, which has 60 thematic and country mandates on a broad range of human rights issues. 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. Special Procedures mechanisms can intervene directly with Governments and other stakeholders (including companies) on allegations of abuses of human rights that come within their mandates by means of letters, which include urgent appeals, allegation letters, and other communications. The intervention may relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process involves sending a letter to the concerned actors identifying facts of the allegation, applicable international human rights norms and standards, the concerns and questions of the mandate-holder(s), and a request for follow-up action. Communications may deal with individual cases, general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of draft or existing legislation, policy or practice considered not to be fully compatible with international human rights standards.

In this connection, we would like to bring to your attention the information we have received regarding **the signing of a Nature Conservation Agreement (NCA) granting monopoly rights of two million hectares (4.9 million acres) of a forest located in the ancestral territories of Sabah Indigenous Peoples to Hoch Standard Pte Ltd, a private company based in Singapore with ultimate control vested in a British Virgin Islands company, Lionsgate Ltd. Allegedly, the agreement was made without respecting Sabah Indigenous Peoples' rights, including their rights to consultation and free, prior and informed consent (FPIC).**

Hoch Standard Pte Ltd

According to the information received:

In the state of Sabah, in Malaysia, 39 ethnic groups of Indigenous Peoples, constitute 58.6% of the population. Sabah's expansive forest covers a total of 4,679,594 hectares, of which 82% is located in Protected Areas, and 42% in Totally Protected Areas. Approximately 25,000 Indigenous Peoples live in Sabah's Forest reserves, and about 325,000 in adjacent areas, having responsibly managed and cared for these forests since immemorial times.

According to the High Conservation Value V and VI Assessments for Sabah, in 2020, there were about 117 villages in designated Totally Protected Areas, 159 located within the boundaries of Sabah's Commercial Forest Reserves, 128 villages within 100 meters of the boundary of a Totally Protected Area or commercial forest, 729 villages within 500 meters and 815 villages within 1 km of those boundaries. These villages depend on the forest for livelihood and traditional and spiritual activities.

The rights of the Sabah Indigenous Peoples are enshrined in the 1930 Ordinance (revised in 1996), forming the foundation for the State's land tenure system and recognizing Native Customary Rights to land and forest products. The Sabah Biodiversity Enactment (2000) guarantees native and community rights, while Sabah's Forest Enactment (1968) Section 15(1) prohibits licensing for commercial exploitation of natural resources in Totally Protected Areas (Forest Reserve Classes I, VI, and VII).

On October 28, 2021, the Sabah State Government reportedly signed an NCA with Hoch Standard Pte Ltd, a company headquartered in Singapore. The agreement gives exclusive rights to the company to develop nature conservation management plans and creates a commercial monopoly over all carbon and other natural capital benefits, including the natural capital contained in the designated area, and to sell, exchange, transfer, or otherwise dispose of in any manner it deems necessary. This exclusive right is for 100 years, with the opportunity for renewal for another 100 years. Under the NCA, Hoch Standard Pte Ltd would secure 30% of gross revenue from the monetization of carbon and other natural capital, while the Sabah State Government would receive 70% of the revenue and be responsible for most management costs and generating carbon credits.

Indigenous, conservation, and civil society organizations have expressed concerns regarding the NCA's compliance with Indigenous Peoples' rights, transparency, due diligence, and technical feasibility.¹

The NCA fails to acknowledge the presence of Indigenous Peoples in the area of the project and do not refer to Indigenous Peoples' rights established in

¹ Malay Mail, "Conservation groups call for transparency, engagement in controversial Sabah carbon deal project", Julia Chan, 11th November, 2021. The parties were: Bornean Sun Bear Conservation Centre, Borneo Rhino Alliance, Danau Girang Field Centre, LEAP – Land Empowerment Animals People, PACOS Trust, Sabah Environmental Trust, Seratu Aatai, South East Asia Rainforest Research Partnership and WWF Malaysia; Statement by 32 civil society organisations and 56 individuals to the State Assembly ("Demand for Engagement, Disclosure and Transparency on Sabah Forest Carbon Deal in the Nature Conservation Agreement (NCA)") on 6th December 2021; Statement by 11 civil society organisations (New Straits Times, "Address NCA technical issues to fully benefit from carbon trade deal, says 11 Sabah NGOs", 9th February, 2021); and the statement by the Sabah Environmental Protection Association (Free Malaysia Today, "More questions than answers on Sabah carbon trade deal", 18th November, 2021)

domestic and international law. This is creating uncertainty on the possible impact of its implementation on the management, use, and access to lands and resources by Sabah Indigenous Peoples, who live on or depend on the land covered by the agreement. By granting 100 years of monopoly rights of two million hectares of the forest mainly occupied by Indigenous Peoples to a foreign private company, for all carbon and other natural capital benefits, the NCA could restrict Indigenous Peoples' tenure rights and access to forest products, such as herbs, plants, and trees used in traditional ceremonies and subsistence diet. The NCA would severely limit Indigenous Peoples' rights to practice their culture and economic activities, such as hunting, fishing, making *tuhau* and harvesting bamboo. Finally, the NCA would restrict Indigenous Peoples' rights to practice, develop, and teach their spiritual traditions and ceremonies and access to their sacred areas. It is uncertain whether indigenous knowledge of medicinal or food plants will be financially compensated if monetized.

In addition, it is reported that the NCA was adopted without meaningful consultation with Indigenous Peoples and without obtaining their free prior and informed consent. They learned of the signing of the NCA on 9 November 2021, after the international press published a story featuring it.² The official text of the NCA was made public on 19 January 2022, when the High Court ordered the Chief Conservator of Forests (CCF) to publish it. However, relevant contents of the agreement, such as the map of the designated area, are still unpublished.

The NCA presents restrictive provisions. For instance, some irrevocable clauses in the NCA seek to make it impossible for the Sabah State Government to cancel the NCA, or for the Legislative Assembly to pass laws that impact its financial profitability without payment of significant compensation. In addition, the NCA grants Hoch Standard Pte Ltd extensive rights, allowing it to seek the commercial use of natural capital or ecosystem services. These rights could be sold to any entity without the Sabah State Government's consent.

Civil society organizations have expressed concern about the lack of clarity on how the project will be carried out, in particular about the measurement and methodology that will be used and its compliance with existing Verified Carbon Standards. In a public statement, 11 Sabah civil society organizations claimed that technical and financial arrangements under the NCA are flawed, with incorrect pricing, lack of understanding of additionality, and lack of transparency and due diligence.

According to the information received, on 29 November 2021, a representative of the Native Communities of Sabah holding Native Customary title filed a lawsuit in the Sabah High Court to request documents to determine if and how the NCA would impact Sabah's Indigenous Peoples. On 10 January 2022, the High Court ordered the Chief Conservator of Forests (CCF) to provide, within eight days, the NCA, the map of its Designated Area, and relevant correspondence and due diligence with Hoch Standard. The CCF complied on 19 January 2022, undertaking to provide the still unprepared Designated Area

² Mongabay, "Bornean communities locked into 2-million-hectare carbon deal they don't know about", John Cannon, 9th November, 2021

map and due diligence materials as they become available.

On 6 December 2021, 32 Civil Society organizations issued a Joint Memorandum to the Sabah State Legislative Assembly (DUN), citing seven concerns and calling for transparency on the NCA.

On 9 December 2021, the Chief Minister of Sabah declared before the State Legislative Assembly that the NCA was not sealed and that the Government would update members of the State Legislative Assembly on the matter, including proceeding with the carbon trading. He also offered to set up a select committee to investigate the NCA deals and terms. On 13 December 2021, the Sabah State Government appointed an Interim Sabah Climate Change Committee to investigate carbon trading, including carrying out due diligence on proposals like the NCA.

On 7 February 2022, the Warisan Party lodged a formal complaint with the Malaysian Anti-Corruption Commission (MACC) regarding irregularities surrounding the negotiation and signing of the NCA.

On 9 February 2022, the Sabah Attorney-General issued a press statement on behalf of the state's Government in which he described a five-point policy on carbon trading, which includes no handing-over of land in any fashion to third parties; carbon sovereignty as the core; no carbon trading without FPIC; and the role the Sabah Climate Action Council (SCAC) "to manage a carbon future in alignment with recognized global standards, safeguards and processes that prioritize equity, inclusion, transparency and multilateralism". The Sabah Attorney-General described the status of the NCA as a non-binding framework subject to due diligence to the satisfaction of the State Attorney-General and the cabinet, the inclusion of an Addendum "by which all unfair and absurd contract terms are removed", the identification and obtaining of FPIC from all affected Native Communities, and the identification of "suitable and available Totally Protected Areas" as the Designated Area.

On 17 February 2022, Carbon Sovereign Sabah released a technical report entitled "Technical & Financial Impediments to the Viability of the Nature Conservation Agreement (NCA)" focused on the economics and practicality of the restoration activities required by the carbon market's additionality requirements. The report indicated some flaws in the premise of the NCA marketing carbon from Sabah's Totally Protected Areas, indicating that the only possibility for claiming additionality – and this also lacks international precedent – would be to argue that restoration is not a current practice or obligation of Sabah's conservation agencies and, therefore, additional carbon sequestered through restoration can be marketed. The report concludes that "it is unlikely that the NCA, in its current form, could be certified to any internationally recognized carbon standard" and "it is highly unlikely (...) that the NCA could generate sufficient saleable carbon to meet the costs of restoration – with no reasonable prospect of the project generating any additional revenue for the State for several decades".³

³ Prof. David Burslem & Dr. Glen Reynolds, "Technical & financial impediments to the viability of the Nature Conservation Agreement (NCA)", 15th February 2022

On 27 July 2023, the Deputy Chief Minister held a press conference with Indigenous organizations, all of whom called on the state Government to move forward with the deal. No further information was provided on how the consultation was conducted and whether the organizations are representative of the Indigenous Peoples affected by the project. Also, the Deputy Chief Minister informed that the NCA implementation would be started in a pilot area, Nuluhon Trus Madi, which constitutes 75,000 hectares of Totally Protected Forest Reserve in central Sabah. In these areas, there are six villages, with approximately 3,400 indigenous residents, who allegedly were not informed of the project. On August 2023, Sabah's Chief Minister, also confirmed to several media outlets that the Sabah State Government is finalizing the NCA.

While we do not wish to prejudge the accuracy of these allegations, we express our concerns over the adoption of the NCA without the conduct of genuine consultations or obtaining the free, prior, and informed consent of affected Indigenous Peoples, as required under international human rights law, including the United Nations Declaration on the Rights of Indigenous Peoples, in article 32. In addition, we express grave concern about the potential adverse impacts of the NCA and the associated project on the right to land, territory, and use of forest resources of Sabah Indigenous Peoples, who live or depend on the land covered by the agreement. In particular, we are concerned about the reported failure by project partners to conduct human rights due diligence, as set out by the UN Guiding Principles on Business and Human Rights, to address these potential adverse impacts, as well as the lack of corporate transparency in relation to the private sector actors involved. In addition, the NCA appears to undermine Sabah Indigenous Peoples' the right to development, which includes the right of peoples to self-determination over all their natural wealth and resources, under the Declaration on the Right to Development (article 1).

We are concerned about the lack of transparency on the terms of the contract, the land covered by the NCA, and the communities of Indigenous Peoples that will be affected, as well as the absence of reference to Indigenous Peoples' rights and mechanisms for equitable benefits sharing. Also, we are concerned about the lack of cultural, environmental, and social impact assessments to analyze the implication that such a large-scale project, encompassing about half of the Sabah Forest, can have on the Sabah population and Indigenous Peoples in particular. We are also concerned about the absence of provisions related to the setting up of measures to safeguard against or to mitigate impacts that the NCA could have on the rights of Indigenous Peoples, including the establishment of independent, accessible, and effective accountability mechanisms for monitoring compliance and mechanisms for the fair sharing of benefits with Indigenous Peoples.

We are further concerned about the absence of human rights due diligence to ascertain the potential adverse impacts of the NCA and the associated project, and to verify the truth and reliability of the company's representation and capability to implement the agreement. Reportedly, Hoch Standard Pte Ltd appears as a shell company with \$1,000 paid-up capital, no business record, no record in carbon trading, and with ultimate control vested in a British Virgin Islands company, Lionsgate Ltd, whose ownership is unknown.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** and standards 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 on the human rights due diligence policies and processes put in place by your company to identify, prevent, mitigate, and remedy the adverse human rights impacts of your activities and, in particular, with respect to the human rights of the Sabah Indigenous Peoples affected by your company's operations, in line with the UN Guiding Principles on Business and Human Rights.
3. Please provide information about specific due diligence or impact assessment measures taken by your company in relation to the NCA of the forest located in ancestral territories of Sabah Indigenous Peoples. In particular, please highlight how your company has conducted meaningful consultation with affected stakeholders and, in particular, with the Sabah Indigenous Peoples, before *and* after the NCA. Please indicate whether any steps were taken to avoid negative social, cultural, and environmental impacts on the Sabah Indigenous Peoples located in the area, including by seeking their free, prior and informed consent for the project on their lands. Please describe the measures that your company has taken, or plans to take, to prevent the recurrence of such situations in the future.
4. Please provide information on the steps taken by your company to ensure that the NCA will not be affecting Sabah Indigenous Peoples' right to development (including self-determination over their natural wealth and resources) in line with the Declaration on the Right to Development.
5. Please provide information on the steps taken by your company to establish, participate, implement and/or enforce an operational-level grievance mechanism, in line with the UN Guiding Principles, in order to address the adverse human rights impacts caused or contributed to by your company's operations, including potential cultural, environmental, social impacts on the Sabah Indigenous People.

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.

Please be informed that a letter on this subject matter has also been sent to those other business enterprises that are involved, including Lionsgate Ltd, as well as to the home-States of all involved companies, the Governments of Malaysia, the Republic of Singapore, and the United Kingdom.

Please accept, Mr. Choon-Hou Ho, the assurances of our highest consideration.

Damilola S. Olawuyi
Chair-Rapporteur of the Working Group on the issue of human rights and
transnational corporations and other business enterprises

Surya Deva
Special Rapporteur on the right to development

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

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 draw to your attention the the UN Guiding Principles on Business and Human Rights (A/HRC/17/31), which were unanimously endorsed by the Human Rights Council in June 2011, as these are relevant to the impact of business activities on human rights. 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.”

According to the Guiding Principles, 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. Furthermore, it exists over and above compliance with national laws and regulations protecting human rights.

Principle 13 has identified two main components to the business responsibility to respect human rights, which require that “business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and] (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts”.

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 recommend in particular that business enterprises "avoid causing or contributing to adverse human rights impacts through their activities, products or services, and to deal with such impacts when they occur", and that they "undertake a human rights due diligence process to identify and assess any actual or potential impacts on human rights posed by the company's own activities and by business partners associated with those activities" (paras. 100-101).

In the 2018 report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (Working Group) to the General Assembly, the Working Group noted that "The Guiding Principles clarify that business enterprises have an independent responsibility to respect human rights and that in order to do so they are required to exercise human rights due diligence. Human rights due diligence refers to the processes that all business enterprises should undertake to identify, prevent, mitigate and account for how they address potential and actual impacts on human rights caused by or contributed to through their own activities, or directly linked to their operations, products or services by their business relationships". In addition, this involves (b) Integrating findings from impact assessments across relevant company processes and taking appropriate action according to its involvement in the impact; (c) Tracking the effectiveness of measures and processes to address adverse human rights impacts in order to know if they are working; (d) Communicating on how impacts are being addressed and showing stakeholders – in particular affected stakeholders – that there are adequate policies and processes in place.

Moreover, we wish to draw the relevance of the Declaration on the Right to Development (GA Resolution 41/128). Article 1 of the Declaration provides that the "right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized." This right "implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources." (Article 1(2)). Article 2(3) of the Declaration further provides that "States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom." The Declaration further requires that States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights (article 8.2). In this line, the ILO Convention 169 prescribes that indigenous peoples of the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well being and the lands they occupy.

We also refer to the Guidelines and recommendations on the practical implementation of the right to development developed by the Special Rapporteur on the right to development (A/HRC/42/38). The Guidelines urge States to design and implement development projects after holding meaningful consultations to identify the development priorities of the communities in a project area and benefits-sharing arrangements that would be suitable for those affected. They further recommend

(para 37) that States should respect the right of indigenous peoples to self-determination to fulfil the right to development. The Guidelines also recommend (para 45) that all actors, including institutions, businesses and investors, who produce information about development projects should provide that information transparently. Specifically:

(a) Information about development projects should be shared with the affected communities as a matter of priority, in the language of those communities and in accessible formats. The information might need to be translated into local and indigenous languages;

(b) Information should be shared in a format that is accessible to target populations.

Moreover, we refer to the report of the Special Rapporteur on the right to development outlining the role of business in realizing the right to development in line with the relevant international standards (A/78/160). The report especially highlights the importance of businesses ensuring the cultural development of Indigenous Peoples through their active, free and meaningful participation in decision making processes (paras 57-61).