

Mandates of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; 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; the Special Rapporteur on the right to food; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the rights of indigenous peoples and the Special Rapporteur on the human rights to safe drinking water and sanitation

REFERENCE:
AL OTH 54/2020

20 July 2020

Mr. Craig Lennon,

We have the honour to address you in our capacities as Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes; 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; Special Rapporteur on the right to food; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the rights of indigenous peoples and Special Rapporteur on the human rights to safe drinking water and sanitation, pursuant to Human Rights Council resolutions 36/15, 35/7, 42/23, 37/8, 32/8, 34/18, 41/12, 42/16, 34/5, 42/20 and 42/5.

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 56 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

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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 the attention of your company concerns relating to **serious risks posed to the enjoyment of human rights of affected populations, in the context of risk of failure of a proposed tailings dam, and other issues arising from the hydroelectric/tailings dam, mine, waste discharge and associated infrastructure on the proposed Frieda River gold and copper mine (“Sepik Development Project”) in Papua New Guinea.**

According to information received:

The Sepik Development Project is a set of four projects in Sepik, in northwest Papua New Guinea (PNG). With a footprint of at least 16,000 hectares, it comprises the Frieda River Copper-Gold Project (a 1,145 hectare, open-pit mine), the Frieda Hydroelectric Project (a 12,700 hectare dam), the Sepik Infrastructure Project (roads and airport and related infrastructure); and the Sepik Power Grid Project (power lines and related infrastructure).

The Project is proposed by an unincorporated joint venture, with 80% in favour of Frieda River Limited and 20% in favour of Highlands Frieda Limited. Frieda River Limited is a PanAust Limited subsidiary company. PanAust is a company headquartered in Australia, and a wholly owned subsidiary of Guangdong Rising H.K (Holding) Limited, which is a wholly owned subsidiary of Guangdong Rising Assets Management Co Ltd. The latter company is a People’s Republic of China state owned company regulated under the State Owned and Assets Supervision Commission, Guangdong. Highlands Frieda Limited is a subsidiary of Highlands Pacific Limited, which is wholly owned by Cobalt 27 Capital Corp, which is headquartered in Toronto, Canada.

The Project documents, including the Environmental Impact Statement (EIS) dated 7 November 2018,¹ are under consideration by the PNG Conservation and Environment Protection Authority (CEPA) for assessment under the Environment Act 2000. The public review and submission process closed on 31 March 2020.

According to the EIS, the mine is planned to have a life of approximately 33 years, after a 7-year implementation period. The hydroelectric project, with a planned lifespan of 100 years, after a 5-year construction period, is to be located downstream from the mine, and is intended to provide electricity for the mine. It is also to provide an Integrated Storage Facility (ISF) to store water and sediment on the surface, and underneath to store process tailings and mine waste rock from the mine. The ISF is to discharge water into Frieda River as part of the operation of the hydroelectric project.

¹ Frieda River Limited, Environmental Impact Assessment (2018) <https://friedariver.com/eis/?v=1>

The power grid is to provide power to the sites. Excess power is to be exported, and after the life of the mine the full generation capacity to be available for export to potential customers in Papua New Guinea and Indonesia. The infrastructure project, including roads, an airport, and an ocean port, is to provide access to the sites, and be open to public use. Ancillary projects and works, which are part of the infrastructure, include a 325km pipeline, soil dumps, and the Ok Binai catchment waste dump.

The Sepik River is 1126 km long and covers an area of 7.7 million hectares. The Frieda River, near where the mine is to be located, contributes around 5% of water inflow to the Sepik River. In 2006, Papua New Guinea's submission to UNESCO seeking recognition of the Upper Sepik River Basin as a World Heritage Site acknowledged, "the Sepik River is one of the least developed areas in PNG and home to approximately 430,000 people who depend almost entirely on products from the rivers and forests for their livelihoods". It further noted, "The area is famed for the gabled spirit houses or "haus tambarans", one of the most dramatic examples of indigenous Melanesian architecture, and a very rich ceremonial carving and music tradition."²

Civil society and indigenous peoples and human rights defenders have raised various concerns relating to the project, urging the Conservation and Environment Protection Authority to reject the EIS and the project. Concerns relate to the inadequacy of the EIS in considering the (i) impacts of the toxic waste (ii) risk of failure of the tailings dam, (iii) destruction of livelihoods, (iv) consultation process with affected communities including availability of information. Since they began raising concerns about the project, human rights defenders have faced death threats, intimidation and have reported gunshots fired at them from unidentified individuals.

Community members raise concern that the EIS appears to have failed to consider potential substantive toxic waste problems, including the discharge of toxic waste into the Frieda River and into the sea near the coastal town of Vanimo. Other impacts include contamination of river and water sources, and effects of contamination on biodiversity. Acknowledging that the EIS states that "Even with [the] worst-case scenario, the [Health Impact Assessment] determined there would be no adverse impacts to human health", perceptions among the community, and anxiety about water quality, may be derived from negative health impacts generally associated with gold and copper mines around the world. Acid rock drainage is associated with skin irritation, kidney damage, and neurological diseases. Air pollution from copper mining is associated with various respiratory illnesses, including asthma and lung cancer.

With respect to stability of the tailings dam, the receiving environment is seismically active. The dam will store 1,450 Mt of waste work (with 1,340 Mt

² UNESCO, World Heritage Convention, Tentative List: Upper Sepik River Basin, <https://whc.unesco.org/en/tentativelists/5065/>

potentially acid forming sulphide) and approximately 1,500 Mt of tailings. The EIS states that to limit the potential for generation of acid and metalliferous drainage, the dam is to provide a permanent water cover for the waste rock and process tailings material from the mine. While termed by the proponents to be “very unlikely”, a failure of the tailings dam and the release of the toxic waste would be catastrophic resulting in loss of life and environmental destruction, as occurred with the Ok Tedi environmental disaster (1984 to 2013).

Consultations concerning the EIS and the Project have not been satisfactory in the view of community members. The EIS relies on reports that are critical to understanding the Project and risk analyses. However, critical background reports were not made available during the public review and submission process. Community representatives formally requested these reports, which were still not provided. For example, the ‘dam break analysis’ mentioned in the EIS was not included in the EIS for public review. A villager requested the dam break analysis from the proponent during a consultation session, but the information was not provided.

There is a lack of information in the EIS about how toxic waste risks are to be managed, signalling deficiencies in the assessment process. For example, the risk of leakage from the 325km pipeline, which would traverse difficult terrain and biodiverse wetlands and habitats, has been inadequately assessed from the perspective of the community members.

As mentioned, the proposed location is a seismically active area. The risk of major earthquake causing damage to the dam will persist for millions of years. The EIS only considers a 200-year timeframe. However, beyond this date, and especially when the tailings dam will not be subject to maintenance and management, the risk will persist. Inadequate detail is included in the EIS on monitoring, maintenance and oversight, which would be necessary to collect data and facilitate public participation, including of the indigenous communities, during and after the project term.

In 2018, Papua New Guinea acknowledged various ongoing challenges in protection of wetlands such as the Sepik River Basin. These include inadequate funding, lack of capacity of the CEPA including in monitoring, competing land uses including extractive projects, and land tenure issues.³ The capacity of Papua New Guinea to monitor the dam’s maintenance by the proponent during the life of the mine or to take on the maintenance itself in perpetuity at the end of the life of the mine comes into question.

There are more than 30 villages located downstream from the proposed dam along the Frieda and Sepik Rivers. The project will displace the four villages of Ok Isai, Wabia, Paupe, and Wameimin 2, affecting approximately

³ Ramsar National Report to COP13 (2018)

https://www.ramsar.org/sites/default/files/documents/importftp/COP13NR_PNG_e.pdf

194 households comprising circa 1,316 people. Consultation with the residents of the affected villages has commenced as part of a resettlement planning process. The social impact assessment prepared as an appendix to the EIS has highlighted that “Project activities will result in the discharge of water, the generation of dust, and the emission of air pollutants, noise and light to the surrounding environment. People who live near or downstream of Project construction and operations may be affected by changes to quality and quantity of land and water resources on which they depend. With Paupe being resettled away from the Frieda River, likely to a location on Kaugumi Creek, residents will have access to a piped water supply and will not be dependent on water from the Frieda River, though may still access and use the river for recreation or fishing. Perceptions held by downstream villagers about water quality will also require active management”. However, neither the proponent nor the State has obtained free, prior, and informed consent of all the villages that rely on the Frieda and Sepik Rivers for their livelihoods. No resettlement plan has been released publicly.

Further, the consultation process in the Sepik Basin has been marked by violence and police suppression. Indigenous peoples in the Sepik Basin protested against the Frieda Mine during the consultation period. In response, local police and officers hired by the proponent adopted measures to intimidate and suppress opposition to the project.

While we do not wish to prejudge the accuracy of these allegations, we wish to express our serious concern regarding the potential and actual threats to the human rights to life, health, bodily integrity, water, food, and others, of the project and the environmental impact assessment process. Further, allegations of violation of the right to free, prior and informed consent of the affected indigenous peoples are concerning. The project not only impinges on the rights to land of the four villages for which the relocation is envisioned, but also all downstream and neighbouring communities, including indigenous communities, whose livelihoods are at risk of destruction on the premise of economic development. The rights of indigenous peoples include the requirement for free prior and informed consent for actions that stand to violate their human rights, including the storage or disposal of hazardous materials in their lands and territories.

We wish to express our concern that the project and its implementation so far appears to disregard the human rights of those affected. It emerges that the people and peoples of the Sepik River Basin will be forced to bear the costs of the Project in perpetuity. We remain concerned that that critical information about the tailings dam, including the dam break analysis, have been made neither publicly available, nor available to affected community members and human rights defenders who request it. This seems highly problematic with regard to the right of access to information. Such information, which may be considered safety information as it has the potential to negatively impact the safety of the community including in the event of a dam break, should never be confidential.

Lastly, we express our concern that the project threatens the cultural rights of the Sepik Peoples, including their right to practice and develop their spiritual and cultural beliefs, which are dependent on the right to a healthy environment. We note that given the nature of the project, it could undermine the rights of Sepik children to life, health, culture, and a healthy environment, including unborn generations. This fear is compounded by the fact that human rights defenders, who try to protect the rights of the indigenous communities, face serious risk to their own life as a result.

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 mandate 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 comments you may have on the above-mentioned allegations.
2. Please provide information with respect to processes undertaken to obtain free, prior and informed consent from all affected Sepik Peoples, including, the four villages planned for resettlement, the downstream villages that fall within the project catchment, and all the villages within the sphere of its environmental effects.
3. Please provide information on any attempts to conduct a supplementary EIS including provision to the public for review and submissions, taking into account the concerns raised.
4. Please provide information on the measures taken to respect the right of access to information, in particular through publication of all documents related to the EIS. Please provide information also on any steps taken to provide any missing critical information demanded by affected communities. Please specify whether your company has considered less intrusive and safer alternatives to construction of the hydroelectric project and especially its tailings dam.
5. Please provide further information on measures to ensure monitoring of this project so that appropriate scrutiny and accountability are maintained during the project's application and development process.
6. Please indicate what measures your company has implemented to ensure that the proponent conducted human rights diligence as set forth in the UN Guiding Principles on Business and Human Rights.

This communication and any response received from your company will be made public via the communications reporting [website](#) within 60 days. 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, 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 may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your company to clarify the issue/s in question.

Please be informed that a letter on the same subject has also been sent to the Governments of Papua New Guinea, Australia, the People's Republic of China, Canada, as well as to other companies involved in the abovementioned allegations.

Please accept, Mr. Lennon, the assurances of our highest consideration.

Baskut Tuncak
Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes

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

Saad Alfarargi
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

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José Francisco Cali Tzay
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Léo Heller
Special Rapporteur on the human rights to safe drinking water and sanitation

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your attention to 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) after years of consultations involving Governments, civil society and the business community.

The Guiding Principles have been established as global authoritative norm for all States and companies to prevent and address the negative consequences related to companies on human rights. The responsibility to respect human rights is a global standard of conduct applicable to all companies, wherever they operate. It exists regardless of the ability and/or willingness of States to meet their own human rights obligations and does not reduce those obligations. It is an additional responsibility to comply with national laws and regulations for the protection of human rights.

“The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (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.” (Guiding Principle 13).

“In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.” (Guiding Principle 19).

Appropriate action will vary depending on whether the business actor causes human rights abuses, contributes to human rights abuses; or whether the adverse human rights impact is linked to the operations of the company by a business relationship. Furthermore, the action will depend on the extent of leverage of the business enterprise to the adverse impact.

To fulfil their responsibility to respect human rights, business enterprises should have in place:

- (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)

In this connection, we recall that Guiding Principle 22 states that: “[w]here business enterprises identify that they have caused or contributed to adverse impacts, they

should provide for or cooperate in their remediation through legitimate processes”. Guiding Principle 20 states that businesses should track the effectiveness of their response. Tracking should: a) be based in appropriate qualitative and quantitative indicators; and b) draw on feedback from both internal and external sources, including affected stakeholders.

Furthermore, business enterprises are expected to utilize their leverage to prevent or mitigate the adverse impact. In addition, if they lack leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors” (Commentary to Guiding Principle 19).

Guiding Principles 25 to 31 provide guidance to business enterprises and States on steps to be taken to ensure that victims of business-related human rights abuse have access to an effective remedy.

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.

We would also like to highlight the responsibility of companies to prevent exposure to hazardous substances and wastes, as detailed in the 2019 report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes to the UN General Assembly (A/74/480). In discharging their duty to conduct human rights due diligence, businesses are responsible for identifying and assessing the actual and potential impacts of hazardous substances and wastes, either through their own activities or as a result of their business relationships, and for communicating information to other businesses, Governments and the public effectively.

We would also like to draw your attention to the 2019 report of the Special Rapporteur on the human rights to safe drinking water and sanitation (A/74/197), where he introduces a megaproject cycle framework. The framework consists of seven stages (from macro-planning to decommissioning) and contains a list of questions that constitute

guidelines for all accountable actors to implement their human rights obligations and responsibilities.

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.