

# Specific Instance to OECD National Contact Point in Finland: the role of Pöyry Group services in the process of the Xayaburi hydropower project in Lao PDR

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## Introduction

The Siemenpuu foundation<sup>2</sup> (henceforth “the Complainant”), with partners in Finland and abroad, is submitting this Specific Instance to the Finnish OECD National Contact Point<sup>3</sup> against the Pöyry Group (henceforth “Pöyry”) for violation of the OECD Guidelines for Multinational Enterprises (henceforth “the Guidelines”). The Complainant requests that the National Contact Point take this case into consideration in their meeting on June 18 2012 and decide on specific dates, additional requests and procedure for handling the case.

The Specific Instance is submitted with respect to services provided by Pöyry and its wholly owned energy sector business unit Pöyry Energy AG to the Government of Lao PDR as a part of the preparations and processes aiming to construct “the Xayaburi Dam”, a 1,285 MW hydropower project near Xayaburi, Lao PDR. While the project is inside Lao PDR, the construction company and the financing banks are from Thailand, and the electricity produced would be exported to Thailand. The impacts of this construction will reach the whole Lower Mekong Basin, crossing national boundaries into Cambodia, Viet Nam and Thailand. The Xayaburi Dam is being pushed to become the first of a series of as many as 11 mainstream dams on the Lower Mekong. The projected negative social and environmental impacts, and scientific uncertainty about impacts, are considerable and significant.

The impacts of the Xayaburi Dam alone have not been fully assessed. The Dam will result in displacement of an estimated minimum of 2 100 people and direct negative impacts, including loss of fertile lands along the river bank, for over 202 000 people.

Throughout the Greater Mekong Sub-region there are strong worries and fears that the Xayaburi Dam will open the doors to a whole series of Lower Mekong mainstream dams. The projected cumulative impacts for all eleven of the planned mainstream dams include, *inter alia*, direct losses to fisheries amounting to USD 476 million / year. The indirect impacts have not been studied. 54 percent of agricultural river-bank gardens would be lost, and in Cambodia and Lao PDR up to 30 percent of protein intake would be threatened, affecting especially poor and vulnerable communities. The livelihoods of at least 2.1 million people will be directly affected. Many negative impacts will be irreversible. Knowledge of the direct and indirect impacts of mainstream dams is vastly inadequate. This means that all the impacts cannot be sufficiently projected or mitigated. Additionally, negative impacts are projected for the diplomatic relations between the countries sharing the Lower Mekong and on co-operation regarding sustainable use of this trans-boundary water resource.

The Pöyry services, involving a compliance report (henceforth: “Pöyry Report”), have been commissioned and directly used to undermine a co-operative regional process regarding the use of a trans-boundary water resources. Through the Mekong Agreement of 1995, the four Lower Mekong Basin states of Lao PDR, Cambodia, Thailand and Viet Nam agreed on the need to reach regional

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<sup>2</sup> Siemenpuu foundation is the lead complainant, a full list of complainants will be brought forward when the Specific Instance is taken up by the Finnish National Contact Point (Annex I)

<sup>3</sup> Committee on Social and Corporate Responsibility

agreement regarding use of essential trans-boundary water resources. According to this agreement no country can proceed to build a mainstream dam unilaterally. All parties have the right to request more information and meaningful, informed consultation.

After the process for building the Xayaburi Dam had been initiated, a meeting of all parties in April 2011 revealed serious concerns and, exercising their rights under the Mekong Agreement, Cambodia, Thailand and Viet Nam requested additional information. The April 2011 meeting brought into the open conflicting opinions about how to use the Mekong River.

Immediately after the April 19 meeting, on May 5, Lao PDR hired Pöyry to do a compliance review with respect to compliance with Mekong River Commission's (MRC) Preliminary Design Guidelines (PDG), and regarding whether or not comments submitted by the four countries during Prior Consultation (PC) had been taken into consideration, and whether or not the Lao Government and Xayaburi Power Company had satisfied the terms of the Prior Consultation.<sup>4</sup>

The Pöyry Report stated that the decision as to whether or not to proceed with the Xayaburi Dam rests with the Lao government alone, and also that the Xayaburi Power Company had mainly complied with the Preliminary Design Guidelines of the Mekong River Commission. The Pöyry Report justified arguments that supported proceeding unilaterally.

This Pöyry Report was ordered against the background of a diplomatic dispute between the parties to the 1995 Mekong Agreement, and the Report, since the reporting of early results in July 2011 and submission of the final report in August 2011, has been serving as the chief technical document justifying for the government of Lao PDR and the Thai construction company to proceed with construction unilaterally, while concluding conveniently at the same time that the prior consultation process has been completed.

Pöyry has exploited its esteemed reputation in the hydropower services sector to provide a "compliance review" that can be used as an essential tool to make possible and to justify breaching Lao PDR's commitment to the 1995 Mekong Agreement. It is thus party to an attempt to circumvent a *not*-concluded, still on-going, regional consultation process that aims at guaranteeing balanced and peaceful co-operation between the countries in the region.

Through Pöyry's services, the Thai hydropower contractor<sup>5</sup>, the Thai banks financing the project and the Lao Government have been provided an essential tool to continue the construction of a highly controversial dam project, while knowingly sidelining an inclusive process that would guarantee meaningful stakeholder consultations and further studies. If these inclusive processes were allowed to proceed to completion, they could reduce the socio-economic and scientific

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<sup>4</sup>Pöyry Energy AG (9 August 2011): **Compliance Report: Government of Lao PDR, Main Report, Xayaburi Hydroelectric Power Project, Run-of-River Plant (henceforth "Pöyry Report")**, p. 6

<sup>5</sup>The main contractor for the Xayaburi dam is Ch. Karnchang, the third largest construction company in Thailand, which is specialized in gaining Government contracts. The Xayaburi Power Company Limited has been set-up as an umbrella company to manage the construction and operation of the Dam. It is mainly owned by Thai companies, of whom Ch. Karnchang is a major share-holder.

uncertainties surrounding the project, leading to deferment or even total cancellation of all plans for Lower Mekong mainstream dams, or at a minimum a deeper understanding of the measures needed to alleviate the sustainability problems of the project.

Pöyry stepped into a situation in which it knew it was venturing outside its own areas of expertise and competence. Pöyry caused explicit harm to the development of critical regional co-operation procedures concerned with whether or not to construct mainstream dams on the Lower Mekong, loading stress onto broad-based legal proceedings which should be encouraged not hindered. Furthermore, the Xayaburi Dam, when built, would have devastating environmental and social impacts, in which Pöyry can be held responsible.

In taking this contract without consulting relevant stakeholders, in performing the services that helped justify unilateral action, as has now happened, Pöyry has demonstrated a lack of due diligence. In this case, the results of Pöyry's services are based on Pöyry's own *irresponsible business conduct* and, while the company is recognizing no responsibility, its products are being used to produce unsustainable outcomes – to moving the construction of the Xayaburi Dam forward as rapidly as possible. At present Pöyry has shown negative interest in attempting to mitigate the harm being done as a result of its own consulting.

### **Finland as a party in trans-boundary water resource management**

Finland, as a member of the OECD and a signatory of the Guidelines, has a binding commitment to implement them. This involves duties to adhere to, implement and promote the Guidelines and encourage their use. In this particular Specific Instance, this implies taking action to address the behavior of Pöyry, which is assisting the Government of Lao PDR in a willful violation of international law. This behavior is in violation of the OECD Guidelines and constitutes a failure by Pöyry to mitigate or abstain from causing significant human rights violations and environmental damage in processes where it can be considered to have considerable leverage vis-à-vis business partners.

Finland and the Finnish National Contact Point have an additional interest to ensure that Pöyry's operations follow the OECD Guidelines, which aim to bring the behavior of enterprises "in harmony with government policies"<sup>6</sup>, as stated in the OECD Guidelines. With its actions Pöyry has systematically undermined some of the Finnish Government's development policies and targets in the Mekong Region that are financed by Finnish tax-payers and implemented in co-operation with development partners. Besides the damage done to co-operation in the Mekong Region, the impacts of Pöyry's actions lead to an intolerable waste of public funding. The Finnish Ministry of Foreign Affairs provides support to regional co-operation, most notably through the Mekong River Commission (MRC) and the financing of the acclaimed Strategic Environmental Assessment of the cumulative impacts of proposed Mekong mainstream hydropower projects, and more broadly, to efforts supporting food security and sustainable development.

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<sup>6</sup>The OECD Guidelines for Multinational Enterprises, 2011 Edition (henceforth "the OECD Guidelines"), p. 13

## Pöyry Group

### Demands to the Pöyry Group

The Complainant requests that a process be initiated with the aim of correcting Pöyry's behavior, mitigating damage already caused and pre-empting further damage in the Xayaburi case (as is now imminent) through public statements and engagement in dialogue with relevant stakeholders. Furthermore, payment by Pöyry for damages caused to the Finnish state and for the wasting of public resources should be considered, and also limiting Pöyry's participation in tendering on projects with trans-boundary impacts in the Mekong Region.

### Actions of the Pöyry Group

The Pöyry Group has defended its role by arguing that it is “just a consultancy”<sup>7</sup>. Pöyry has, however, been an integral, necessary and continuously the chief justifying part of the process the Lao Government has used for fast-tracking the Xayaburi project. The Pöyry Group can be considered, with its services, to be causing substantial, recurring and imminent negative impacts, as it has aided and abetted the circumvention of the 1995 Mekong Agreement, in addition to failing to use its leverage to encourage its business partners to comply with the 1995 Mekong Agreement and the OECD Guidelines.

Pöyry Energy AG operating under the Pöyry Group:

- 1) has knowingly entered a conflict with unofficial capacity outside the MRC regional co-operation process, without consulting major stakeholders or even the MRC;
- 2) has provided services, enhanced by its own business reputation, that have directly and foreseeably been used by the Lao government as justification to proceed unilaterally – in violation of Lao commitments under the 1995 Mekong Agreement to seek regional agreement, consult meaningfully and provide information on request on the trans-boundary impacts of the Xayaburi project, thus placing development of the whole regional co-operation at risk;
- 3) has provided a technical analysis that downplays the trans-boundary impacts of the Xayaburi project and the obstacles facing the project, and thus impeded the right of other stakeholders to obtain the information they need in order to mitigate such impacts.

### Applicability to OECD Guidelines and main points of divergence

The update of the OECD Guidelines for Multinational Enterprises in 2011 makes them explicitly applicable to service sector companies, such as the Pöyry Group and business units operating under it. The complaint can be submitted to the home country of the company in charge of strategy and responsibility issues, in this case Finland, where Pöyry Plc and Pöyry Group are based, and is thus eligible to be accepted for consideration by the Finnish National Contact Point.

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<sup>7</sup>E.g. Mika Pohjonen, Pöyry Plc, 3 April 2012 in the seminar on Finnish development policy and corporate responsibility in the Mekong region, arranged by Siemenpuu foundation (henceforth “the Mekong seminar”)



The main divergences with the Guidelines are under General Policies: companies are required to "Contribute to economic, environmental and social progress with a view to achieving sustainable development"<sup>8</sup>, to "avoid causing or contributing to adverse impacts" through their own operations<sup>9</sup>, and to seek to prevent or mitigate adverse impacts caused by other entities when related to their services by a business relationship, and also to encourage business partners to apply the Guidelines.

Pöyry's actions in the process for constructing the Xayaburi Dam violate all of the above principles. The company is, under the Guidelines, obliged to "use its leverage to influence the entity causing the adverse impact to prevent or mitigate that impact"<sup>10</sup>. This Pöyry has not done.

In the human rights chapter, commitments to avoid impacts, avoid contributing to impacts, and encourage business partners to apply the Guidelines are all reiterated. Pöyry has, in violation of these principles, actively encouraged the Government of Lao PDR to go ahead with untested and inadequate mitigation measures that require further study. The Xayaburi Dam project must also be seen in the context of being able to spark plans to build up to 11 mainstream dams, and cause conflict between the countries and citizens over the use of trans-boundary water resources.

The Commentary to the human rights chapter makes clear that inadequate in-country laws or government unwillingness to respect human rights are not excuses for companies to not comply with international standards, especially with regard to concern for the many vulnerable populations and ethnic groups of the Mekong Sub-region.

Furthermore, according to the OECD's environmental Guidelines, companies are obliged to "engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation."<sup>11</sup> Companies should "engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities."<sup>12</sup>

Pöyry has undermined a process of further consultation instead of supporting or recommending its perpetuation. Particularly, the Pöyry Report has in several instances been used publicly and in official processes as the chief justification to proceed with the Xayaburi construction, without Pöyry using its leverage, as a company of "high reputation", to mitigate or hinder this use. Specifically, the Report has been used to justify the Lao Government's decision to halt the consultation process, accept financing, and approve and initiate construction on the hydropower project. The use of the Pöyry Report in this manner was foreseeable given its timing and the conclusions provided. Instead of improving opportunities for stakeholders to participate, as the Guidelines and the 1995 Mekong Agreement recommend, Pöyry chose to undermine the possibilities for stakeholders, at all levels, to participate in the development of a key process for advancing the sustainable development of the Mekong region.

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<sup>8</sup> OECD Guidelines, p. 19

<sup>9</sup> *ibid.*, p.20

<sup>10</sup> *ibid.*, p. 24

<sup>11</sup> *ibid.*, p. 42

<sup>12</sup> *ibid.*, p.20

All of this amounts to a serious breach of the OECD Guidelines, and the Complainant hereby requests that the case be considered as a Specific Instance to the Finnish National Contact Point. The Complainant requests also that the case be taken up as soon as possible, while possibility still exists to mitigate some of the grave harm being caused by Pöyry's irresponsible behavior.

## General Issues

### The Actors

**The Complainant**, collectively the Siemenpuu Foundation; Friends of the Earth Finland; the Finnish Asiatic Society;<sup>13</sup> is bringing this Specific Instance in front of the Finnish National Contact Point.

In this case the Complainant is representing the interests of the affected communities, sustainable development in the Greater Mekong Sub-region, and common, public interest in holding multi- and trans-national companies and corporations responsible for their actions on their own home turf.

The Finnish groups, collectively the Complainant, share interest in ensuring that Finnish public money allocated to development work in the Global South is used meaningfully and not wasted. The Complainant considers that the actions of the Pöyry Group have seriously undermined their interests. The Complainant seeks mitigation of current, imminent and projected impacts. Descriptions of the groups forming the Complainant can be found in Annex I<sup>14</sup>.

**Pöyry Plc**, the accused, is one of the world's largest engineering and consulting companies, providing a wide variety of services in sectors such as energy, forestry, industry, water and environment. The business operations of the Pöyry Group are conducted through four business groups: Energy, Management consulting, Industry and Urban. The parent company of the Pöyry Group is Pöyry Plc. Both are registered and have their Headquarters in Finland. The Pöyry Group is responsible for developing the Group's strategy, for supervising implementation of strategy, for financing, for realizing synergistic benefits and for general co-ordination of the Group's operations.<sup>15</sup> Pöyry Energy AG, based in Switzerland, is the division in charge of hydropower operations. Pöyry employs about 7,000 experts working from within an office network that extends across 50 countries and all continents.

### Language used in the process of the Specific Instance

Given the wide variety of groups that are affected by the case and the broad, international scope of the groups represented by the Complainant, the Complainant requests that the case be handled in the English language only. The Finnish language can be used in oral and written form if translation services are provided by the OECD National Contact Point in Finland.

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<sup>13</sup> The list of complainants is to be supplemented, see footnote 2

<sup>14</sup> Annex I, complainants and their logos

<sup>15</sup> See [www.poyry.com](http://www.poyry.com)

## No Parallel legal proceedings

No parallel legal proceedings exist vis-à-vis this Pöyry Specific Instance, which makes the case appropriate for being taken as such into consideration by the National Contact Point.

## Applicability

### Applicability of the OECD Guidelines to Pöyry Group

The OECD Guidelines present no obstacles to the acceptance of this case. The Pöyry Group is a Finnish company with multinational scope in the service sector. While all business sectors and multinational companies are subject to the Guidelines, the service sector is explicitly underlined. The Pöyry Group exercises significant control over the entity, Pöyry Energy AG, involved in the committing the activities in violation of the OECD Guidelines.

### Applicability of the OECD Guidelines to Finnish Companies

As a signatory of the OECD Guidelines, the Guidelines apply to companies registered in Finland, and Finland has a binding commitment to implement the Guidelines.<sup>16</sup>

### Pöyry Group: a Finnish company

The Pöyry Group and its parent company Pöyry Plc (originally Jaakko Pöyry Plc) was founded by Dr Jaakko Pöyry in 1958<sup>17</sup>. In the 1990s Pöyry started to create synergies between its forest industry knowledge and the energy and environment industries. This was done with the acquirement of *inter alia* Ekono Energy (Finland) in 1993 and through strategic alliance with Electrowatt Engineering (Switzerland) in 1997. In 1999 these two companies merged to form Electrowatt-Ekono, which is wholly owned by the Pöyry Group and became Pöyry Energy AG in 2006. Pöyry has acquired a number of companies, extended itself across several sectors and today performs a variety of services<sup>18</sup>. In 2006 the Pöyry Group revised and reorganized itself.<sup>19</sup> All of its business

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<sup>16</sup>See OECD Guidelines for Multinational Enterprises (2011). p. 11, Paragraph 1 states: The *Guidelines* provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards. However, the countries adhering to the *Guidelines* make a binding commitment to implement them in accordance with the *Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises.*"

<sup>17</sup>At the beginning, Jaakko Pöyry Plc conducted basic engineering for forest industries. The company started to grow fast, and Pöyry was able to establish international subsidiaries in North America, Southeast Asia, Africa and Australia.

<sup>18</sup>Pöyry Business Review 2008, p. 44

<sup>19</sup>Since then, Pöyry has also developed and implemented several Group-wide strategic and integrating programs and changes in order to make sure that all the Group's companies are operating through the operational guidelines and principles, including guidelines on social responsibility, common to the whole Group. The most recent of these programs is the Pöyry Corporate Compliance Program, launched in 2010. The main purpose of this Group-wide program is to "ensure that Pöyry and its employees comply with laws, rules, regulations and the Operating Guidelines of the company, specifically the Code of Conduct" (Pöyry Annual Report 2011, p. 25). Since 2008, the President and CEO of Pöyry has been Heikki Malinen.

groups adopted a common Pöyry brand and identity and, since then, have developed their operational policies following a vision and principles common to the whole Group.<sup>20</sup>

### **Applicability of the Guidelines to Multinational companies**

The Guidelines are applicable to all multinational companies “regardless of their sector”. The violation of the Guidelines by the Pöyry Group and its entities make the Guidelines applicable.

### **Pöyry Group: A multinational company**

Pöyry employs about 7,000 experts and has an office network in about 50 countries on all continents. Its activities are global in nature.

### **Applicability of the Guidelines to Parent Entities**

Independent of ownership the OECD “Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities)”.<sup>21</sup> The OECD Principles of Corporate Governance, recognized and enforced by the Guidelines in paragraph 7, “call on the board of the parent entity to ensure the strategic guidance of the enterprise”.<sup>22</sup> Paragraph 9 further extends these principles explicitly to apply to enterprise groups.

### **Pöyry Group: A parent entity in strategic control of Pöyry Energy AG**

Pöyry Energy AG was formed by merging Electrowatt Engineering and Ekono Energy. Before the revision and reorganization of the Pöyry Group in 2006, its name was Electrowatt-Ekono.<sup>23</sup> The merger took place in 1999, which is the same year the new company was fully acquired by Pöyry Plc<sup>24</sup>. Since then, Pöyry Plc and the Pöyry Group have had one hundred percent control over the financial and operating policies of Pöyry Energy AG<sup>25</sup>. The Pöyry Group widely uses Pöyry Energy AG in its corporate communications to demonstrate its excellence and corporate responsibility.<sup>26</sup>

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<sup>20</sup>The business entities under Pöyry Plc and Pöyry Group, including Pöyry Energy AG, are governed by the laws of their domicile and the common governance principles of Pöyry. Pöyry Energy AG is a part of the Energy business group of Pöyry, whose President (currently Ari Asikainen) is also a member of the Group Executive Committee. He is responsible for the implementation of the Code of Conduct and other principles and policies common to the whole Group in all of the companies of the business group, and reports to the President and CEO of Pöyry. Although the business groups are globally responsible for their operations, they have to operate following the Group’s internal reporting structure and operational guidelines and principles. Thus the highest responsibility is on the President and CEO of the Group. The headquarters of the Pöyry Group and Pöyry Plc is in Vantaa, Finland.

<sup>21</sup>OECD Guidelines, p. 17, Paragraph 4

<sup>22</sup>*ibid.* p. 22

<sup>23</sup>Pöyry Switzerland Brochure 2011, p. 3; Chris Lang and Nick Hildyard 2003: Dams Inc. 2: Electrowatt-Ekono, p.1, accessible via [www.chrislang.org](http://www.chrislang.org)

<sup>24</sup>Pöyry Annual Report 1999, p. 2

<sup>25</sup>*ibid.*, p. 55

<sup>26</sup>In the Pöyry Company Brochure and in annual reports different projects of the different business groups are used as examples of typical projects of the Pöyry Group. For example, a project of Pöyry Energy AG, the Nam Ngum 2 dam in Lao PDR is mentioned in Company Brochure (2011), in Switzerland Brochure (2011) and in the annual report of 2010. In the Company Brochure, Nam Ngum 2 is mentioned in a group of “selected work” which sets examples of how “Pöyry is a global company dedicated to finding smarter, cleaner and more effective energy solutions. Turn to us when you want a partner with a strong track record in designing and implementing total solutions for complex energy projects” (p. 10-11). In the Swiss brochure, Nam Ngum 2 is used to demonstrate Pöyry’s “optimum use of

The Finnish Pöyry Group exercises a dominant influence over the strategy and corporate governance of the Swiss Pöyry Energy AG since the consolidation of the Group's strategy in 2006 over the different sections of the company.<sup>27</sup>

### **Applicability on service sector companies**

The OECD Guidelines have been written with purchasing and investing enterprises in mind. However, the updating of the Guidelines in 2011 reflects changes in the global economy, placing more emphasis on service sector companies. The Preface of the updated Guidelines (2011) states in paragraph 2: "With the rise of service and knowledge –intensive industries and the explosion of the Internet economy, service and technology enterprises are playing an increasingly important role in the international marketplace"<sup>28</sup>. The Guidelines also state elsewhere that a precise definition of a multinational enterprise is not needed. The companies for whom the Guidelines are relevant "operate in all sectors of the economy."<sup>29</sup>

The Guidelines go on to note that many businesses have "called upon consulting [and other] services, contributing to the accumulation of expertise" in the area of good corporate citizenship, good practices and good business conduct<sup>30</sup>. This suggests that the Guidelines consider service providers to be a part of the applicable sectors when they operate on a multinational scale.

### **Pöyry Group: A service sector company**

The Pöyry Group and its subordinate entity of Pöyry Energy AG are major service providers in the hydropower sector. Also, with a large list of services on its own web page and in many other documents, it identifies itself as a service sector company.

### **Summary**

The Pöyry Group's various violations of OECD Guidelines for Multinational Enterprises, collective agreements and human rights can be considered by the Finnish National Contact Point. The violations of the OECD Guidelines by Pöyry Energy AG (Switzerland) in the services provided to e.g. the Government of Lao PDR should be handled as a Specific Instance by either the Finnish National Contact Point or the Finnish National Contact Point in consultation with its Swiss counterpart, or in parallel by the two national contact points.

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know-how and experience [that] has led to proven success" (p. 10-11). Throughout its 2010 annual report, the company places emphasis on corporate responsibility, code of conduct and ethical principles. Nam Ngum 2 (along with the other five projects mentioned on pages 6-7) is thus used as one of the success stories of the Pöyry Group. The use of Nam Ngum 2 in corporate communication demonstrates how Pöyry Energy AG is tightly connected to Pöyry Plc and the operations of the entire Group.

<sup>27</sup>Pöyry Business Review 2006, p. 3 & 9; Pöyry Switzerland Brochure 2011; see also footnote 19

<sup>28</sup>OECD Guidelines, p. 13

<sup>29</sup>*ibid.* p. 17

<sup>30</sup>*ibid.*, p. 14-15, Paragraph 7

# Background to Hydropower Development on the Lower Mekong Mainstream

## Decision making processes to regulate mainstream dams<sup>31</sup>

The Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, signed by Cambodia, Lao PDR, Thailand and Viet Nam on 5 April 1995, defines a set of principles and processes that Member Countries have specifically committed to in cases where one or more countries proposes to utilize the waters of the Mekong and its tributaries within the boundaries of the four Member Countries of the Lower Mekong Basin (LMB)<sup>32</sup>. It establishes the Mekong River Commission (MRC) with three bodies (Council, Joint Committee and Mekong River Commission Secretariat) as an international organization to ensure implementation of the 1995 Mekong Agreement through its provisions and to adopt procedures to facilitate addressing such issues in a co-operative and amicable manner.

The types of water use under the 1995 Mekong Agreement include proposed mainstream hydropower developments, such as the Xayaburi project in Lao PDR. As the case of the Xayaburi Dam is the first time a Lower Mekong mainstream project has been submitted for consideration to the MRC, it undoubtedly will serve as an important precedent for any other mainstream hydropower project proposals, in terms of the set requirements, expected procedures, etc.

Article 5 (Reasonable and Equitable Utilization) of the 1995 Mekong Agreement sets out the nature and requirements for any proposed use of waters of the Mekong River system and the extent to which the process of notification, prior consultation and/or agreement is needed among Member Countries at the Joint Committee (JC) level.

Depending on the type, time and place of water use, one of three different processes applies. The applicable process depends on (i) whether the water use proposed by the notifying country is on the Mekong mainstream or a tributary; (ii) whether it involves use of water in the wet or the dry seasons; and (iii) whether it involves transfer of water within sub-basins of the LMB (intra-basin use) or outside of the Mekong basin (inter-basin diversion). Implementation of Article 5 is supported by the Procedures for Notification, Prior Consultation and Agreement (PNPCA) prepared under Article 26 (Rules for Water Utilization and Inter-Basin Diversions) and approved by the MRC Council at its 10th Meeting on 29-30 November 2003. The MRC Joint Committee at its 22nd Meeting on 31 August 2005 approved guidelines on Implementation of the PNPCA. Decisions taken by the Joint Committee under Articles 5 and 26 of the 1995 Mekong Agreement need to be reported to the MRC Council under the Rules of Procedures of the Joint Committee (Rule 14).

The Xayaburi project proposed by Lao PDR involves constructing a dam across the Mekong mainstream for in-stream hydro-electricity generation in both wet and dry seasons. It falls under the

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<sup>31</sup> largely based on and including citations from **Mekong River Commission Secretariat (24 March 2011), Proposed Xayaburi Dam Project - Mekong River: Prior Consultation Project Review Report (henceforth "MRC technical review")**, p. 1-2

<sup>32</sup> See further information on the 1995 Mekong Agreement at <http://www.kellnielsen.dk/mekong/agreem.htm>

category of a mainstream, dry season intra-basin use under Article 5(B)(2)(a) and is thereby subject to a process of “prior consultation, which aims at arriving at an agreement by the Joint Committee”.

The term “prior consultation” is defined in Chapter II of the 1995 Mekong Agreement as a process “...that would allow the other member riparians to discuss and evaluate the impact of the Proposed use upon their uses of water and any other affects, which is the basis for arriving at an agreement. Prior consultation is neither a right to veto the use nor unilateral right to use water by any riparian without taking into account other riparians’ rights.” The definition of prior consultation implies that substantive issues affecting other countries that have been raised as a part of the prior consultation process will be taken into consideration by the notifying country *before commencing implementation* of a proposed project.

Section 5 of the PNPCA covers the case of prior consultation in more detail and sets out the roles of the various parties, the process for review, the need for timely submission, and the forms to be used for both the submission by the notifying country and the responses by the other countries. It includes a provision to establish a JC Working Group, which has been done in the case of the Xayaburi submission.

Section 5.4.3 of the PNPCA describes the overall aim for the JC to reach an agreement related to the proposed use and issue a decision including any conditions agreed upon. It outlines the responsibility of the notifying state not to implement the proposed use until the opportunity for its consideration has been provided through the PNPCA process and for any concerns or reservations to be placed on record.

The PNPCA states in Article 5.5.1 and the Guidelines provide that the prior consultation process should take six months from the date documents are received by the Joint Committee from the MRC Secretariat and that this process should be timely and take place before commencement of project implementation. If necessary, the Joint Committee may agree to extend the timeframe of the process. In the Xayaburi case, an agreement was not met on whether the prior consultation was complete by the end of the six-month period in the Joint Committee meeting held on April 19 2011, and this decision was deferred to a ministerial-level meeting to be held in the following fall.<sup>33</sup>

For proposed mainstream dams on the Lower Mekong, MRC has also developed Preliminary Design Guidance (PDG), which these dams should comply with. The PDG has been available since September 2009 to provide overall guidance for Mekong mainstream hydropower schemes in the form of performance targets, design and operating principles for mitigation measures as well as monitoring and suggestions for adaptive management. It addresses the following five topics: i)

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<sup>33</sup> See MRC, 19 April 2011: “Lower Mekong countries take prior consultation on Xayaburi project to ministerial level”, <http://www.mrcmekong.org/news-and-events/news/lower-mekong-countries-take-prior-consultation-on-xayaburi-project-to-ministerial-level/>: “Cambodia, Lao PDR, Thailand and Viet Nam today agreed that a decision on the prior consultation process for the proposed Xayaburi hydropower project be tabled for consideration at the ministerial level, as they could not come to a common conclusion on how to proceed with the project [...] The JC Members agreed that there is still a difference in views from each country on whether the prior consultation process should come to an end.”

fisheries / fish passage, ii) sediment transport and morphology, iii) water quality, aquatic ecosystem health and environmental flows, iv) navigation and v) safety of dams.<sup>34</sup>

## **Dramatic cumulative impacts of mainstream dams**

As the Mekong River is home to the world's largest inland fishery and is the second most bio-diverse river in the world after the Amazon River, fisheries research has alerted that the Xayaburi Dam could cause significant and irreversible damage to the river's ecosystem and to the millions of people in the region who depend upon the river's rich resources for their livelihood and food security. The major environmental and social risks of the dam and the need for further studies have been documented in an ever-growing number of scientific studies produced by the Mekong River Commission (MRC) and other experts, who warn that the regional governments are not in a position to make an informed decision on the dams at this point in time. These concerns were outlined and summarised in the findings of the MRC's Strategic Environmental Assessment (SEA), which recommends deferring all decisions over mainstream dams for a period of ten years, reflecting the possibly serious impacts on sediment transport and fisheries that might be expected.<sup>35</sup> It is important to note that following the release of the SEA, the World Bank Group "confirmed it will not finance and has no plans to invest in hydro projects on the mainstream of the Mekong"<sup>36</sup>.

## **Xayaburi Hydropower project**

Located in Northern Lao PDR, the proposed Xayaburi Dam is the first of eleven large hydropower dams planned for the Lower Mekong River's mainstream. The US\$ 3.8 billion project is expected to generate 1,285 megawatts of electricity, around 95 percent of which will be exported to Thailand. The leading developer of the project is a Thai company, Ch. Karnchang, which owns a considerable share of the Xayaburi Power Company Limited, which was established to construct and operate the dam. The developer has announced that building on the dam began on March 15 2012.<sup>37</sup> As the first dam proposed for the Lower Mekong River's mainstream, the dam is subject to the Procedures for Notification, Prior Consultation and Agreement (PNPCA) as indicated in the *1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin* ("1995 Mekong Agreement"; see above).

## **The decision making process for the Xayaburi dam**

Despite the concerns raised over the Xayaburi Dam's considerable trans-boundary impacts and the significant opposition expressed to the project by the region's countries, civil society and researchers, there are reports that the building of the dam is moving forward. While the four governments have yet to reach a consensus as to whether or not to proceed with the project, the Government of Lao PDR is attempting to move forward with the project on a unilateral basis despite its commitments to regional co-operation.

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<sup>34</sup> MRC Technical Review, p. 9

<sup>35</sup> See also chapter "What impacts are imminent"

<sup>36</sup> "World Bank Group Welcomes Strategic Environmental Assessment of Mekong Mainstream Dams" at <http://www.worldbank.or.th/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/THAILANDEXTN/0,,contentMDK:22740418~menuPK:333316~pagePK:2865066~piPK:2865079~theSitePK:333296,00.html>

<sup>37</sup> Phnom Penh Post, 19 April 2012: "Thai firm says Xayaburi project has begun"

<http://www.phnompenhpost.com/index.php/2012041955661/National-news/worrying-dam-claims.html>



The regional decision making process over the proposed Xayaburi Dam first began in September 2010, when the Lao PDR submitted project documents to the Mekong River Commission Secretariat initiating the 1995 Mekong Agreement's Procedures for Notification, Prior Consultation and Agreement (PNPCA). During the period of regional consultation, seven stakeholder consultations were organized by the MRC in Cambodia, Thailand and Viet Nam, in which widespread concern over the dam's trans-boundary impacts and the poor consultation process was expressed. The project documents of the Xayaburi Dam, including its environmental impact assessment, were reportedly not made publicly available before nor were they accessible during the process when people were consulted about the dam in Lao PDR<sup>38</sup>. Further, there is no evidence as to schedule, content, or minutes on the MRC web-page of PNPCA relevant informed consultations within Lao PDR. As the Pöyry report is being used to claim that Pöyry considers that Lao PDR has complied with PNPCA process, we request clarification on the terms in which Pöyry considers that the Lao population has exercised its basic rights of consultation in this regard.

The MRC also initiated a technical expert review of the key project documents, in which they criticized the project's Environmental Impact Assessment for its lack of rigorous analysis or data, documented considerable trans-boundary fishery impacts and reaffirmed that no proven mitigation measures exist. MRC's technical review was published on March 24 2011 to help the riparian countries to form their views on the proposed use of the Lower Mekong mainstream.

At a Special Joint Committee meeting of the MRC on April 19 2011, government representatives from Cambodia, Lao PDR, Thailand and Viet Nam agreed that a decision on the Xayaburi Dam should be deferred until a future ministerial-level meeting is held. Whilst Lao PDR had proposed to proceed with the dam, Cambodia, Thailand and Viet Nam called for an extension to the decision-making process, citing concerns about trans-boundary impacts and knowledge gaps that require both future study and public consultation. During a side-meeting at the 18<sup>th</sup> ASEAN Summit on May 7 2011 between the Prime Ministers of Lao PDR and Viet Nam, Lao PDR agreed to temporarily suspend the dam while a new study on the dam's social and environmental impacts was carried out. This resulted in a three-month compliance review by the Swiss Company Pöyry Energy AG, which was deemed by civil society as an attempt to green-wash the dam by giving a biased and inconsistent argument that the dam would not have much impact<sup>39</sup>. The Report did not assess trans-boundary impacts, but rather studied the Lao PDR's compliance to its obligations under the MRC, without consulting the MRC itself. The Pöyry Report has not been publicly endorsed by the MRC.

However, despite its regional commitments, Lao PDR appears to now be moving forward with the dam despite its neighbors' concerns, using the Pöyry Report as justification<sup>40</sup>. In early September 2011, the Lao Government stated its intention to begin construction on the dam by the end of year. Preparatory construction on the project has been underway since late 2010. On April 17 2012, a statement was released by Xayaburi's lead developer Ch. Karnchang saying that the construction of

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<sup>38</sup> Dr. Philip Hirsch 2011: Review of Xayaburi Dam EIA incorporation into regional consultation on impacts.

[http://www.internationalrivers.org/files/attached-files/hirsch\\_xayabouri\\_dam\\_esia\\_consultation\\_process.pdf](http://www.internationalrivers.org/files/attached-files/hirsch_xayabouri_dam_esia_consultation_process.pdf)

<sup>39</sup> See International Rivers, 9 November 2011: "Laos Uses New Report to Greenwash the Xayaburi Dam"

<http://www.internationalrivers.org/resources/laos-uses-new-report-to-greenwash-the-xayaburi-dam-3699>

<sup>40</sup> See the following chapter of "Events in chronological order"

the dam has begun on March 15 2012 and will be finished within eight years<sup>41</sup>. This unilateral decision to proceed with the dam ignores Lao PDR's legal obligations to respect the outcome of the regional decision-making process, and its customary international law obligation to conduct a trans-boundary EIA.<sup>42</sup>

### Events in chronological order

On May 4 2007, a Memorandum of Understanding (MoU) for the proposed Xayaburi Dam was signed between the Government of Lao PDR and the project's lead developer, Thailand's Ch. Karnchang Public Company Limited ("Ch. Karnchang")<sup>43</sup>. A Project Development Agreement was signed between these two actors in November 2008, and the dam's Environmental Impact Assessment (EIA) was first submitted to Lao PDR for approval in February 2010.

In 2009 the MRC commissioned the International Centre for Environmental Management (ICEM) to do a Strategic Environmental Assessment (SEA), which assesses trans-boundary and cumulative impacts of the development and construction of hydropower in the Lower Mekong mainstream. The assessment was conducted during 16 months, and it was finished in September 2010. The final report of the SEA was published in October 2010. The SEA identifies many gaps in knowledge regarding potential direct and indirect impacts of mainstream dams, stating that according to the current knowledge these impacts can be devastating and irreversible, and recommends deferring the building of any mainstream dams for 10 years.

The Final EIA report, along with the Social Impact Assessment, was finalized in August 2010. The Government of Lao PDR then submitted key documents to the MRC Secretariat and initiated the Xayaburi Dam's regional decision making process in September 2010, and the process for prior notification, consultation and agreement (PNPCA) began on October 22 as all the relevant project documents were distributed to the Governments of Cambodia, Thailand and Viet Nam<sup>44</sup>. The key documents for the project were not made public until mid-March 2011 – several weeks *after* regional stakeholder consultation meetings took place as part of the PNPCA process. Thus, the documents were not publicly available during the consultation process.<sup>45</sup>

On April 19 2011, the Governments of Cambodia, Lao PDR, Thailand and Viet Nam deferred the decision on whether or not to build the Xayaburi Dam to a future ministerial-level government meeting, expected to take place in October or November 2011. During the April meeting a diplomatic conflict erupted. Whereas the Lao government wanted to proceed, the other governments decided to use their right to request more information under the framework of the PNPCA process.

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<sup>41</sup> Phnom Penh Post, 19 April 2012: "Thai firm says Xayaburi project has begun"

<http://www.phnompenhpost.com/index.php/2012041955661/National-news/worrying-dam-claims.html>

<sup>42</sup> See Mekong Legal Network, *Briefing Note on Duties of notification, prior consultation, and assessment arising from international law in relation to the Xayaburi dam project in northern Lao PDR*, September 2011

<sup>43</sup> Ch. Karnchang, Investor Relations, CK Overview, at [http://www.ch-karnchang.co.th/index\\_en.php](http://www.ch-karnchang.co.th/index_en.php) (Ch. Karnchang is a publically-owned Thai construction and infrastructure building company).

<sup>44</sup> MRC Technical Review, p. 3

<sup>45</sup> Hirsch 2011; See also International Rivers, 14 March 2011: "Fate of Mekong River hangs in the balance", <http://www.internationalrivers.org/resources/fate-of-mekong-river-hangs-in-the-balance-3730>

On May 5 2011, the Lao Government commissioned Pöyry to write a compliance report. Pöyry was tasked with analysing the compliance of the Xayaburi Power Company with relevant MRC Guidelines. After publicised conflict at the April meeting, it was clear to the general public and Pöyry that there is a potential conflict over the use of water resources in the region between the different governments. It must also have been clear to Pöyry that its report was intended as the Lao Government's answer to the critiques raised by the MRC technical review, the Governments of Cambodia, Thailand and Viet Nam and the Strategic Environmental Assessment.

The content of the services requested from Pöyry can be defined through the Terms of Reference of Pöyry, as it was contracted by the Lao Government on May 5 2011:

“The Consulting Services Agreement for Compliance Review signed between the Government of Lao People's Democratic Republic and Pöyry Energy Ag on 5 May 2011 asks for the following matters to be reported on:

- Whether the Owner (Xayaburi Power Company) has complied with and satisfied the Mekong River Commission (MRC) Design Guidelines
- Whether Government of Lao (GOL) and the Owner have taken into consideration the comments submitted by each of Mekong River Committee (MRC) member countries during the Prior Consultation (PC) process
- Whether the GOL and the Owner have complied with and satisfied the terms of the ‘Prior Consultation Project Review Report on the Xayaburi Project’, dated 24 March 2011
- Issues relating to the development, construction and implementation of the Xayaburi Hydro Power Plant (HPP) and any discrepancies, conflicts and the need for any changes thereto in connection with the comments by the Riparian countries.”<sup>46</sup>

The Pöyry Report has been used continuously to support decisions on forwarding the Xayaburi Dam. On June 8 Pöyry advised Lao PDR that it is possible to proceed with the process leading to the building of the Xayaburi Dam, and the Lao Government, citing Pöyry, gave a green light to Ch. Karnchang and Xayaburi Power Company.<sup>47</sup> On August 9 Pöyry submitted the report to the Lao

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<sup>46</sup> Pöyry report 2011, page 6:

“The reviewed documents consist of:

The Feasibility Study, the Outline Design including drawings, part of the EPC contract, the Concession Agreement, and Environmental documents like the Environmental Impact Assessment, Social Impact Assessment, and the Resettlement Action Plan related to the Xayaburi project.

Concerning the Compliance with MRC Guidelines the following reports have been used as reference:

- Preliminary Design Guidance for Proposed Mainstream Dams in the Lower Mekong, August 2009, MRC
- Prior Consultation Project Review Report, including the annexes, MRC [MRC Technical Review]
- Strategic Environmental Assessment of Hydropower on the Mekong Mainstream Final Report October 2010, MRC
- Form for Reply to Prior Consultation Viet Nam
- Form for Reply to Prior Consultation Kingdom of Cambodia
- Form for Reply to Prior Consultation Thailand
- Comments by Lao PDR on the MRCs Technical Review Report of the proposed Xayaburi Dam Project

This document summarizes our findings and conclusions...”

<sup>47</sup> From a letter from the Department of Energy Promotion and Development to Xayaburi Power Company Limited, dated 8 June 2011:

Government. During this process Pöyry did not consult any relevant stakeholders, governments, or the MRC. The Report involved no new research. On October 29, citing Pöyry, Thailand signed the Power Purchase Agreement, relying on the Lao PDR's argument that the PNPCA process has been completed, which had been established as a requirement for proceeding from the Thai side<sup>48</sup>. This shows that even though the MRC has not recognized or been part of the Pöyry Report, the Pöyry Report is being used as an official report. On November 15, based on Pöyry report, the Thai Cabinet permitted a state-owned bank to finance the project<sup>49</sup>. On February 2012 another Thai bank cited the Pöyry Report as justification for approving financing<sup>50</sup>. The project is financed by four Thai banks, which are Bangkok Bank, Kasikornbank, Krung Thai Bank and Siam Commercial Bank.<sup>51</sup>

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"The GOL has now received a view on the Prior Consultation process from Pöyry on June 2, 2011, which states that the Lao PDR has complied with the 1995 Mekong Agreement and the PNPCA on the Prior Consultation Process. Pöyry notes that the Lao PDR has provided opportunity for each Member Country of the MRC to evaluate, discuss, and comment on the Xayaburi Project, and taken all legitimate concerns from the Member Countries into consideration. It thereupon concludes that "the Prior Consultation of the Xayaburi Project has now been completed and the Prior Consultation has ended at the MRC Joint Committee level" in accordance with the terms of the 1995 Mekong Agreement.

Accordingly, despite certain other remaining commitments, we hereby confirm that any necessary ... in relation to the 1995 Mekong Agreement has been duly taken in a spirit of cooperation and working together of all relevant parties." (Emphasis in the original)

<sup>48</sup> From an unofficial translation of a letter from the Thai Ministry of Natural Resources and Environment to the Permanent Secretary, Ministry of Energy, 26 October 2011:

"The Ministry of Natural Resources and Environment, Lao PDR, had submitted the progress report of the Further Study on the Xayaburi Hydro-Power Project as requested by the Council Members of the Mekong River Commission (MRC) through the working group of the Joint Committee (JC), Mekong River Commission under the prior consultation process. Lao PDR had hired Povry Energy AG to study the comments and recommendations of the Joint Committee's working group and came to a conclusion that the Project has been implemented in accordance with the MRC's Operating Guideline. Lao PDR wishes to implement the project as planned (details attached).

The Ministry of Natural Resources and Environment views that Lao PDR has insisted to exercise its sovereign rights to proceed with the Xayaburi Hydro-Power Project and has confirmed that the Prior Consultation process has completed."

At the end of the letter, a note is written: "Dear Director of the Energy Policy and Planning Office, Please inform the EGAT so that they could sign PPA."

See also [http://www.banktrack.org/show/news/thailand\\_defies\\_neighbors\\_on\\_contentious\\_xayaburi\\_dam](http://www.banktrack.org/show/news/thailand_defies_neighbors_on_contentious_xayaburi_dam):

"In a letter dated 30 January 2012, the Thai Minister of Energy Arak Cholthanon informed the Senate Committee on Corruption Investigation and Good Governance Promotion that "the Ministry of Natural Resources confirms that the Prior Consultation process has completed." Minister Cholthanon further stated that "EGAT [the Electricity Generating Authority of Thailand] and the Xayaburi project developer have signed the PPA [power purchase agreement] on 29 October 2011.""

<sup>49</sup> Minutes from Thai Cabinet Meeting, November 15<sup>th</sup> 2011, from session where the Thai cabinet permitted a state-owned bank to finance the project

<sup>50</sup> February 21<sup>st</sup> 2012. Hearing of the Thai Human Rights Commission, another Thai Bank testified explicitly that it used the Pöyry report as its basis for financing the project.

<sup>51</sup> Bangkok Post, 25 April 2012: "Mekong plans anger riverside communities",

<http://www.bangkokpost.com/news/local/290301/mekong-plans-anger-riverside-communities>

On December 7-9 2011, a senior ministerial-level meeting was held in which a decision was expected to be made by the four governments on whether or not the Xayaburi Dam can proceed. The Governments of Cambodia, Lao PDR, Thailand and Viet Nam agreed to delay the Xayaburi Dam, because of demands for further study on the trans-boundary impacts of the proposed Mekong mainstream dams. In this session, Japan was tasked with furthering other studies. No timetable for the delay was announced.<sup>52</sup>

Construction on access roads and workers' camps for the dam continued without interruption.<sup>53</sup>

To answer to some of the critiques that Lao PDR faced over the Pöyry Report and concerns raised by the Government of Viet Nam of how Xayaburi will affect Vietnamese agriculture in the Mekong Delta through changes in sediment and nutrient flows, on January 18 2012 the Lao Ministry of Energy and Mines (MEM) hired a French consulting and service company, Compagnie Nationale du Rhône (CNR), to conduct a Peer Review of the Pöyry Report. The final report was submitted to MEM March 30 2012. The review concentrates solely on issues related to sediments and nutrients, water flows and navigation. Thus it does not consider the fish migration issues or other environmental issues that are expected to cause devastating social impacts. Like the Pöyry Report, CNR's review does not offer any new scientific information on the impacts of the dam, but bases its conclusions and recommendations on a desk study. In fact, the final report cannot be considered a peer review of the Pöyry Report, but rather an extension on Pöyry's work on proposing alternative technology for the Xayaburi Dam based on experience from European and North American rivers. The CNR report is narrower in scope than Pöyry's services and does not consider issues like compliance or completion of the PNPCA process. The review downplays Xayaburi's impacts on sediment and water flows, turning the blame solely on the Chinese mainstream dams in the Upper Mekong River. The CNR review concludes that the Xayaburi dam can be easily brought in compliance with the MRC guidelines vis-à-vis sediments, nutrients, water flows and navigation, as was concluded by Pöyry.<sup>54</sup>

On April 17 2012, Xayaburi's lead developer Ch. Karnchang released a statement on its website saying the building of the dam had begun on March 15 after finalizing the construction contract with the Xayaburi Power Company.<sup>55</sup>

At the Japan-Mekong Summit held in Tokyo April 20-21 2012 the Mekong countries and Japan agreed to carry out a study on the negative impacts of the Xayaburi Dam, with Japan providing funding through Official Development Assistance (ODA). This study had been called for in

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<sup>52</sup> International Rivers, 8 December 2011: "Mekong Governments Delay Xayaburi Dam Pending Further Study", <http://www.internationalrivers.org/resources/mekong-governments-delay-xayaburi-dam-pending-further-study-3693>

<sup>53</sup> Kirk Herbertson, International Rivers, 3 April 2012 Mekong seminar: "No regional agreement has been reached yet on Xayaburi, and yet the project is moving forward. Preliminary construction on Xayaburi continues..."; See also International Rivers, 29 February 2012: "Thailand defies neighbors on contentious Xayaburi dam", <http://www.internationalrivers.org/resources/thailand-defies-neighbors-on-contentious-xayaburi-dam-3686>

<sup>54</sup> Compagnie Nationale du Rhône: Xayaburi Hydroelectric Power Project – Peer Review of the Compliance Report made by Pöyry – Final Report, 30 March 2012.

<sup>55</sup> Phnom Penh Post, 19 April 2012: "Thai firm says Xayaburi project has begun" <http://www.phnompenhpost.com/index.php/2012041955661/National-news/worrying-dam-claims.html>

December's ministerial-level meeting, when the four Mekong countries agreed that another study was needed before the Xayaburi Dam construction could begin.<sup>56</sup> Despite this decision, however, it seems Lao PDR is unilaterally proceeding with the dam.

On Tuesday, April 24 2012, coinciding with Ch. Karnchang's annual shareholders' meeting, civil society groups and community representatives from villages from along Mekong River rallied in front of the Ch. Karnchang's headquarters in Bangkok. They deemed the construction of Xayaburi Dam as irresponsible and demanded that the construction stop immediately while further studies are conducted on the trans-boundary ecological and social impacts of the dam. The protesters submitted a letter of their concerns to a Ch. Karnchang's official and then moved their protests to the Bangkok headquarters of Siam Commercial Bank, one of the four Thai Banks funding the Xayaburi project. The protestors then submitted a second letter calling for the bank to end its funding for the Xayaburi Dam.<sup>57</sup>

Cambodia remains incredulous at the prospect of unilateral development<sup>58</sup>. In early May it announced that if Lao PDR is going to proceed with building the dam unilaterally, it is considering filing a legal complaint against Lao PDR.<sup>59</sup> On May 3 2012 the Lao Government announced that no actual building on the dam is taking place before more consultations take place, although the status of this declaration remains unclear.<sup>60</sup>

## Enter Pöyry

### Pöyry's Compliance report

The Pöyry Energy AG Compliance Report and its Terms of Reference have been discussed above. Both the actions and the inactions of Pöyry in the process towards building the Xayaburi Dam amount to a serious breach of the Guidelines.

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<sup>56</sup> *ibid.*, see also Viet Nam News, 23 April 2012: "Prime Minister Dung supports Japan-Mekong co-operation": <http://vietnamnews.vnagency.com.vn/in-bai/223811/prime-minister-dung-supports-japan-mekong-co-operation.html> and Bloomberg News, 20 April 2012: "Japan pledges USD 7.4 Billion Aid to Mekong Nations": <http://www.businessweek.com/news/2012-04-20/japan-pledges-7-dot-4-billion-aid-to-mekong-nations>

<sup>57</sup> International Rivers, 24 April 2012: "Protestors condemn Ch. Karnchang over Xayaburi dam construction" <http://www.internationalrivers.org/blogs/263/protestors-condemn-ch-karnchang-over-xayaburi-dam-construction>, see also Bangkok Post, 25 April 2012: "Mekong plans anger riverside communities" <http://www.bangkokpost.com/news/local/290301/mekong-plans-anger-riverside-communities>

<sup>58</sup> Phnom Penh Post, 23 April 2012: "Xayaburi study locks in funding" <http://www.phnompenhpost.com/index.php/2012042355715/National-news/xayaburi-study-locks-in-funding.html>, see also Radio Free Asia, 25 April 2012: <http://www.rfa.org/english/news/cambodia/dam-04192012143244.html>

<sup>59</sup> Radio Free Asia, 9 May 2012: "Xayaburi Dam Construction Suspended", <http://www.rfa.org/english/news/laos/xayaburi-05092012154022.html?searchterm=Xayaburi>

<sup>60</sup> The Nation, May 4<sup>th</sup> 2012: "Laos: No work on Xayaburi dam until green problems solved", <http://www.nationmultimedia.com/politics/Laos-no-work-on-Xayaburi-dam-until-green-concerns--30181251.html>

The Pöyry services in the Xayaburi case are fourfold. Firstly in July 2011, the company advised the Government of Lao PDR that proceeding with the project is consistent with the PNPCA and the 1995 Mekong Agreement. Secondly, in August, the company submitted a report to the Lao Government without any consultation with other stakeholders or the regional co-operative body, the Mekong River Commission.

Thirdly, there is significant confusion regarding the role of Pöyry and its actions. While a Pöyry's representative argues that the company has "only reviewed major project documents"<sup>61</sup>, the Pöyry Hydropower brochure describes the role of the company in the Xayaburi process as follows: "Review of major project documents, regular site visits, review of project construction progress, financial status, environmental compliance"<sup>62</sup>. With this contradiction, the Complainant requests that the National Contact Point and other interested parties describe the full and true nature of interactions between the Lao Government and the Pöyry Group and its entities.

Fourthly and finally, Pöyry has also put at the service of the Lao government its credibility and global standing as one of the most respected international actors in the hydropower sector. This service, which links the brand name of Pöyry and the report including recommendations, form an essential tool which the Lao Government has repeatedly used as the chief justification for proceeding with the project and circumventing the regional co-operation and consultation process. The nature of this service can be seen when the Lao Government cites that the compliance review has been done by "Pöyry Energy AG.. an internationally acclaimed consulting firm"<sup>63</sup> and later that it was done by "Pöyry, an independent reputable consulting firm"<sup>64</sup>. This standing is echoed in Pöyry's own documents, several newspaper articles and expert statements that highlight the reputability of the Pöyry Group. The support of an actor with high reputation was crucial to the Lao Government for it to proceed with the Xayaburi project after the diplomatic dispute with its neighbors in April 2011. Pöyry can thus be considered to have additional "leverage" vis-a-vis the Lao Government, as the nature of the service was essential for the continuance of the Xayaburi project.

While the company has cited itself as "just a consultancy" when identified as the target of critique,<sup>65</sup> this perspective omits the fact that in addition to their concrete services, the consultants in a controversial project also bring in their credibility and high global standing. The Pöyry name is one part of the service and the actual review of compliance another.

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<sup>61</sup>Mika Pohjonen, Pöyry Plc, 3 April 2012 Mekong seminar

<sup>62</sup>Pöyry (2011): HYDROPOWER. Make your project a success. Brochure accessed via [www.poyry.com](http://www.poyry.com), 11 March 2012

<sup>63</sup>Letter to Xayaburi Power Company on June 8 2011

<sup>64</sup>Lao PDR's Response to the 18<sup>th</sup> Meeting of the MRC Council, 7-9 December 2011:

"[...] Lao PDR will continue to work with reputable international experts to review and improve the final design of the Xayaburi HPP. We will consult with the member countries to address specific concerns until we are all satisfied with the reasonable and practical mitigation measures.

In fact, Lao government has contracted Poyry, an independent reputable international consulting firm in the fields of hydropower development and water management to carry out the review of previous studies and design of Xayaburi HPP. We are convinced that the project will have insignificant trans-boundary impact on the Mekong River [...]"

<sup>65</sup>E.g. Mika Pohjonen, Pöyry Plc, 3 April 2012 Mekong seminar

## How Pöyry should have behaved under the OECD Guidelines

The fact that Pöyry has failed its own policies of due diligence, corporate responsibility and commitment to “highest ethical standards” in its services, makes it important to closely scrutinize the behavior of the company in this Specific Instance under the OECD Guidelines for Multinational Corporations. According to the Guidelines, Pöyry should 1) “contribute to economic, environmental and social progress”<sup>66</sup>, 2) “avoid causing or contributing to adverse impacts”<sup>67</sup>, 3) seek to prevent or mitigate adverse impacts caused by other entities when related to their services by a business partnership<sup>68</sup> 4) and encourage business partners to apply the Guidelines<sup>69</sup>. The company should also 5) have “alone or in co-operation” used its leverage to influence “the entity causing the adverse impact to prevent or mitigate that impact”<sup>70</sup>. The Commentary to the human rights chapter makes clear that inadequate in-country laws or government unwillingness to respect human rights are not excuses for companies not to comply with international standards<sup>71</sup>.

## Pöyry’s non-Guidelines compliant behavior

### *Prior to signing the contract with the Lao Government*

Firstly, prior to taking the assignment Pöyry should have consulted with the MRC to establish that any services it would recommend would not lead to an imminent breach of Lao PDR’s commitments under the 1995 Mekong Agreement.

Second, could these conditions not be established, Pöyry should either have refused the Terms of Reference, or if possible, renegotiated its Terms of Reference for the contract – to be able to state both areas of compliance and non-compliance with the PNPCA process and other requirements clearly and frankly.

By taking the contract in its final form, Pöyry knowingly entered a trans-boundary dispute in an unofficial capacity outside of the framework of the Mekong River Commission and the regional co-operation process. This conflict had surfaced in regional and global media shortly before Pöyry was hired to draft a compliance review.

### *Within the scope of its services*

By providing a technical analysis that downplays the project’s trans-boundary and regulatory impacts, Pöyry actively denied the other governments’ right to more information and regional agreement.

Although knowing how the report would be used, Pöyry did not list areas of non-compliance with the Mekong Regional Agreement in its report visibly. Pöyry should have made explicit that building on the actual dam should not proceed before the requirements outlined have been fulfilled.

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<sup>66</sup> OECD Guidelines, GP1, p. 19

<sup>67</sup> *ibid.*, GP11, p. 20

<sup>68</sup> *ibid.*, GP12

<sup>69</sup> *ibid.*, GP13

<sup>70</sup> *ibid.*, Commentary 20, p. 24

<sup>71</sup> *ibid.*, p. 32



Without employing any legal expertise or previously consulting any of the stakeholders involved, including the MRC and the neighboring countries, Pöyry drafted a report that was foreseeably used by the Lao Government and the project developer as justification for moving forward unilaterally, in violation of the 1995 Mekong Agreement.

Pöyry concluded that the requirements of the PNPCA process were concluded, although several consultations had been conducted *prior* to the publication of the environmental impact assessment<sup>72</sup>.

Pöyry should have consulted legal advice to establish whether or not the demands of the Mekong Agreement and the PNPCA process have been appreciated to such a degree that following the conclusions of the Pöyry Report would not amount to a breach of Lao PDR's commitments under the Mekong Agreement.

In its report, Pöyry recommended a “build now, adapt later” approach, which is in contradiction with MRC's Preliminary Design Guidance's precautionary principles<sup>73</sup>.

### *After the Report had been issued*

After submitting the report Pöyry has neither publicly distanced itself from nor questioned the public use of its report in justifying the Lao Government's decision to proceed unilaterally and quickly with the building of the Xayaburi Dam. If Pöyry feels that its arguments have been misrepresented, it should publicly state areas of disagreement and non-compliance. Pöyry argues that it is the choice of the Lao PDR Government how they wish to go forward but declines to accept responsibility for its part in making that decision probable.

### **What impacts are imminent**

#### *Known impacts of the Xayaburi Dam and how Pöyry aims to mitigate these*

The impacts the Xayaburi Dam alone would have on fisheries are not sufficiently known. According to the MRC's technical review on Xayaburi, the “gaps in knowledge [...] lead to considerable uncertainty about the scale of impact on fisheries and associated livelihoods, both locally and in a transboundary context.”<sup>74</sup> According to the review, “effective fish passage at Xayaburi would need to pass a migratory biomass that is likely to be much higher than previously

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<sup>72</sup> It should be also noted that “the PNPCA process, its Project Review Report and the conclusions of the MRC Member countries were produced between 6 months and one year **after** the Xayaburi project documents reviewed by Pöyry were published. For this reason, the Xayaburi project documents review could not possibly have taken the PNPCA comments into account before publication” (WWF fisheries review, p. 5, emphasis in the original)

<sup>73</sup> **Kirk Herbertson: Sidestepping science: Review of the Pöyry Report on the Xayaburi Dam. International Rivers 2011 (henceforth “IR Review”); WWF, November 2011: Critical Review of the Pöyry Compliance Report about the Xayaburi Dam and the MRC Design Guidance, Fish and Fisheries Aspects (henceforth “WWF fisheries review”), p. 3; See also Annex II for our analysis of the Pöyry report; how Pöyry considers issues related to fisheries, sediments and people.**

<sup>74</sup> MRC Technical Review, p. ii. As the citation already implies, besides direct displacement of people, social impacts of the Xayaburi and other mainstream dams are directly related to the ecological changes such as reduction of fisheries and nutrient flows in the Mekong River. The poorest households are most affected, e.g. by reduced food security.

recorded in any fish-passage facility globally”. The passing biomass can peak over 10,000 tons of fish per hour in the early wet season.<sup>75</sup> Pöyry suggests a fish-pass facility that has only been tested in Europe and North America<sup>76</sup>, where biomass and fish biodiversity are much lower than in the Mekong, and further claims that “[f]or proper handling of fish passes, there is a need to improve the baseline data. Such data must be obtained and developed and there is sufficient time to complete such work during the early part of the construction phase, which will allow any necessary technical adaptations to be made.”<sup>77</sup> However, an Expert Group of biologists, ecologists and engineers convened by the MRC in 2008 concluded that there was no evidence that even the fish-passage facilities used for fish migrating upstream in large tropical rivers in Latin America, Africa and Asia could cope with the massive fish migrations and high species biodiversity in the Mekong mainstream<sup>78</sup>. Pöyry also omits mentioning the MRC’s Preliminary Design Guidance (PDG) requirement, according to which any mainstream dam must use a fish passage technology that ensures safe passage for 95 percent of target species through the dam site under all flow conditions.<sup>79</sup>

Despite being described as a run-of-river dam, the Xayaburi Dam would create a 100-kilometer “reservoir” behind it<sup>80</sup>, in which water flow conditions would be different and slower than in the free flowing Mekong, which would lead to sediment trapping behind the dam. Among other adverse impacts nutrient balances will be impacted, as approximately 70 percent of nutrients are associated with the sediments in Mekong<sup>81</sup>. Sediment reduction downstream of the Xayaburi Dam might also lead to erosion of the riverbanks<sup>82</sup>. There will be consequential impacts on sediment resources, ecosystem services and biodiversity depending on the extent of the change in sediment movement<sup>83</sup>, and there are multiple uncertainties and gaps in knowledge still<sup>84</sup>. Even though the Chinese mainstream dams on the Upper Mekong have already reduced sediment flows significantly, the Xayaburi Dam would play an important role in further reductions in the context of possibly multiple mainstream dams in the Lower Mekong<sup>85</sup>.

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<sup>75</sup> MRC Technical Review, p. 25: “The migratory biomass of the Mekong is one of the largest of any river in the world. In the early wet season, when large pangasiid catfishes and large cyprinids are migrating and the migratory biomass in the upper migration zone is estimated to be 36,000 tonnes, there may be 10,000 kg of fish per hour passing, if we assume the migration is evenly distributed over five months. There is also likely to be pulses of higher biomass with seasonal and diel peaks.”

<sup>76</sup> IR Review, p. 11

<sup>77</sup> Pöyry Report, p. 14. It must be noted that this kind of approach runs contrary to established science. Also according to the MRC technical review (p. 32), the impacts that may occur during construction are potentially long term and it is possible that the fish populations will not recover. Thus all research on possible impacts on fisheries (etc.) and on finding a sufficient fish-passing technology before any construction begins is vital, in case the impacts cannot be mitigated and the dam should be totally cancelled.

<sup>78</sup> MRC Technical Review, p. 24

<sup>79</sup> Pöyry Report, see also IR review, p. 4

<sup>80</sup> MRC Technical Review, p.15

<sup>81</sup> MRC Technical Review, p. 46

<sup>82</sup> MRC Technical Review, p. 52

<sup>83</sup> MRC Technical Review, p. 44

<sup>84</sup> MRC Technical Review, p. 54

<sup>85</sup> MRC Technical Review, p. 59 & 61-62

The Pöyry Report confirms the Xayaburi reservoir would block part of the sediment flow<sup>86</sup>. Pöyry suggests a “flushing outlet” to best mimic the natural sediment flow conditions, as is demanded by the MRC’s PDG, while at the same time acknowledging that the river’s natural sediment flows are not studied<sup>87</sup>. As the natural sediment transport conditions are still unknown, Pöyry’s recommendations amount to guesswork<sup>88</sup>. Pöyry also omits considering the ecological impacts of the flushing outlet technology it proposes<sup>89</sup>, even though MRC’s technical review addresses this issue<sup>90</sup>.

At the construction site, three thousand residents have already been relocated<sup>91</sup>, while the estimate of the total population being displaced due to Xayaburi dam was only 2,100 people<sup>92</sup>.

If the Xayaburi dam is constructed, it will likely open gates for other mainstream dams as well, by setting a precedent for the extent to which MRC governments must reach agreement before a dam can go forward. Some cumulative assessments have been conducted, including the MRC’s technical review on the proposed Xayaburi Dam, and experience from other areas is said to suggest that most of the cumulative impacts are associated with the construction of the first dam<sup>93</sup>. A trans-boundary environmental and social impact assessment has not to this date been conducted, and even the EIA of the project has been suggested to be of low quality.

### *Cumulative impacts of 11 mainstream dams*

Due to many mainstream dams being proposed in the Lower Mekong Basin (LMB), International Centre for Environmental Management (ICEM) conducted a Strategic Environmental Assessment (SEA) of Hydropower on the Mekong Mainstream for the MRC. The SEA Final Report was published in October 2010, a month after the Xayaburi documents were submitted to the MRC, but the report’s conclusions were known to the MRC governments several months in advance. According to this SEA Final Report, if all 11 mainstream dams were built, they would have significant net negative impacts on the fisheries and agriculture sectors, thus affecting people’s livelihoods and food security. The losses in fisheries directly due to LMB mainstream dams are expected to be worth USD 476 million / year.<sup>94</sup> If all 11 mainstream dams were built, it is estimated that, of the total loss in fish resources, 340,000 tons are associated directly with the mainstream dams, which is 16 percent of the fish resources of the 2000 baseline<sup>95</sup>. Proposed reservoir fisheries

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<sup>86</sup> Pöyry Report, p. 31

<sup>87</sup> Pöyry Report, p. 37-38 & 41-42

<sup>88</sup> IR review, p. 14

<sup>89</sup> See e.g. Pöyry Report, p. 35

<sup>90</sup> MRC’s Technical Review, p. 50 & 53

<sup>91</sup> Bangkok Post, 25 April 2012: “Mekong plans anger riverside communities”

<http://www.bangkokpost.com/news/local/290301/mekong-plans-anger-riverside-communities>

<sup>92</sup> IR Review, p. 7

<sup>93</sup> MRC Technical Review, p. i

<sup>94</sup> **International Centre for Environmental Management: Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Summary of the Final Report, October 2010 (henceforth “SEA summary”), p. 11**

<sup>95</sup> SEA summary, p. 15: “If 11 mainstream dams were in place, the total loss in fish resources would be 550,000-880,000 tonnes or 26-42 % compared to the 2000 baseline – ~340,000 of that estimate directly due to mainstream dams.” These numbers include the impacts of the Chinese mainstream dams and the tributary dams planned to be built in the Lower Mekong Basin; a total of 77 dams.

cannot compensate for the loss in capture fisheries, but only would produce one tenth of the lost capture of fish.<sup>96</sup> If all the 11 mainstream dams are built, it would lead to a reduction of 25 percent in the nutrient loading, which would have further impacts on the primary reduction of the river and through aquatic food chain also on the fisheries<sup>97</sup>. Loss of fisheries and associated proteins would lead to declines in nutritional health in Lower Mekong Basin peoples, particularly in Cambodia and Lao PDR where up to 30 percent of the national protein supply would be at risk. 54 percent of all riverbank gardens on the Lower Mekong River will be lost due to inundation and erosion.<sup>98</sup> The livelihoods of at least 2.1 million people will be directly or indirectly affected. Of these people, approximately 107,000 people will be displaced.<sup>99</sup> It should be further noted that there are significant gaps in knowledge regarding the impacts of mainstream dams in the Lower Mekong Basin, as noted by the SEA, MRC and Pöyry, which means the potential impacts may become even more severe through unpredictable feedback and tipping point phenomena<sup>100</sup>.

It should also be noted that the way the Xayaburi project is handled in the decision making process in the MRC Joint Committee's PNPCA process and vis-à-vis MRC's PDG sets a precedent for how future mainstream dams are planned and decided on, since the Xayaburi Dam is the first mainstream dam ever to be a subject to the PNPCA and PDG. This further affects on what kinds of impacts the future mainstream dams will have.

#### *Unpredictable political impacts of Lao PDR's actions*

On May 3, Lao PDR declared that the Xayaburi construction has been suspended, after strong opposition from the civil society and especially Cambodia, which threatened to file a legal complaint against Lao PDR, if it continued to build the Xayaburi Dam based on a unilateral decision.<sup>101</sup>

The irresponsible behavior of the Lao government supported by Pöyry's services might lead to dissolution or weakening of the Mekong Agreement and the MRC, which further will have unpredictable impacts on the processes and frameworks for dialogue over future mainstream dams. The emerging crisis in the management of this trans-boundary watershed will also affect the international relationships in the Lower Mekong Basin. This means that by providing a tool for Lao PDR to drive the Xayaburi Dam construction forward fast and unilaterally, Pöyry is also considered partly responsible for this development in international relations in the Lower Mekong Basin.

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<sup>96</sup> SEA summary p. 15. It should also be noted that investing on aquaculture in order to compensate for the loss in capture fisheries is not an answer either, as it cannot replace it in terms of food security, since it might not be accessible to the poor.

<sup>97</sup> SEA summary p. 14

<sup>98</sup> SEA summary p. 11

<sup>99</sup> SEA summary p. 16

<sup>100</sup> See e.g. MRC Technical Review, p. 59: "Experience from other large rivers subject to the cumulative effects of multiple dams indicates that substantial reductions in sediment supply are likely to trigger complex morphological responses. The nature, extent, and sequence of morphological adjustments cannot be predicted a priori. Given that both fine and coarse loads are likely to be reduced substantially, what can be expected is that morphological responses will be widespread and persistent, with multiple consequential damages to habitats, ecosystems, and agricultural productivity, especially in the delta and nearby coastal areas."

<sup>101</sup> See e.g. Radio Free Asia, 9 May 2012: "Xayaburi Dam Construction Suspended", <http://www.rfa.org/english/news/laos/xayaburi-05092012154022.html?searchterm=Xayaburi>

These impacts remain only possible at the present time, as the Lao Government has remained inconclusive as to whether it considers the PNPCA process finalized and whether it will authorize construction to begin. However, in this context and given the tumultuous political history of the region, a cautious approach would be advisable.

### **What Pöyry did was essential for the causing of these effects**

Pöyry is regularly cited as a highly prestigious service sector company and one of the largest and most established consultants in the energy sector. It can thus be argued, that Pöyry was one of few energy sector actors with both the reputation and know-how to provide a sufficient justification to the Lao Government to proceed unilaterally with the Xayaburi Dam. From this perspective, Pöyry's services amount to an essential service to the building project.

### ***The Lao government as a business partner***

As has been demonstrated above, it was crucial for the Lao Government to have the reputable Pöyry to provide a compliance review in order to justify moving forward with the Xayaburi project. Furthermore, it is worth noting that Lao PDR is planning to build over 70 large-scale hydropower projects on its territory, in which Pöyry might see an important possibility to increase its business in South East Asia, as it has planned<sup>102</sup>.

### ***Pöyry's close ties to the Thai construction company***

When Pöyry was asked for a compliance review for the Xayaburi project, it was still providing multiple services to Ch. Karnchang in the construction and initiation of the Nam Ngum 2 Dam on a Mekong tributary not so far from the Xayaburi site in Lao PDR. There has been a close business relationship between Pöyry Energy AG and Ch. Karnchang for years, which might have caused a conflict of interest for Pöyry.

The Dam has only recently become operational. Both Ch. Karnchang, Pöyry Group and Pöyry Energy AG use the Nam Ngum 2 dam as a reference of a successful case in their corporate communications.<sup>103</sup>

### ***Pöyry's deficient internal processes of corporate governance and likely re-occurrence of violations amount to a systematic breach of internal processes***

The Complainant is concerned that Pöyry's own systems of corporate responsibility have broken down and lost their credibility in view of the Xayaburi case. This worry is strengthened by the voices of civil society groups that express concern about Pöyry Energy AG in a number of high-profile projects.<sup>104</sup>

Pöyry has publicly highlighted the responsibility of the Lao government in the future development of the Xayaburi Dam<sup>105</sup>. However, Pöyry's own Code of Conduct ("the Code") was revised in 2010<sup>106</sup>. It "defines the standards of behavior everyone who works for Pöyry must follow – across all countries and in all areas of operation" and thus all the Pöyry employees "are committed to

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<sup>102</sup> See e.g. Pöyry Annual Report 2011, p. 18, 36 & 41

<sup>103</sup> See also Annex III

<sup>104</sup> Chris Lang & Nick Hildyard: Dams Inc. 2: Electrowatt-Ekono. January 21 2003; See also Annex III

<sup>105</sup> Yle Radion News, 9 March 2012

<sup>106</sup> <http://www.poyry.com/news-events/news/poyry-publishes-its-revised-code-conduct>

following only the highest ethical standards”. Pöyry also expects “the same standards from all of [their] business partners”.<sup>107</sup>

The Code is said to be a

“part of the Pöyry Operating Guidelines, which must be followed by all Pöyry employees. All other policies, guidelines and instructions that Pöyry follows are based on the principles set out in this Code. Stricter guidelines or more detailed instructions may be necessary in certain regions, countries, businesses or functions, but they can never contradict this Code.”<sup>108</sup>

The code goes on to cite excellence in the areas of environmental and other responsibility. However, this view of Pöyry is severely contradicted in the reviews of the Pöyry Report, which essentially highlight that Pöyry is trying to green-wash the Xayaburi dam project.<sup>109</sup>

## **The General Importance of addressing Pöyry Group’s behavior in the Mekong region**

Pöyry has been part of several controversial hydropower projects. They share similar features in that they fail to address trans-boundary impacts and have had dire consequences in the Mekong region, for example in the case of the Yali Falls. These cases will be discussed in more detail in Annex III.

### **Prior attempts at engaging Pöyry in dialogue**

There have been several attempts to engage Pöyry in a dialogue regarding its services to Lao PDR in the case of Xayaburi. These attempts have mainly failed, since Pöyry denies its responsibilities vis-à-vis the development of the Xayaburi hydropower project.

- 1) In July 2011, a Finnish reporter tried to interview Pöyry on its services regarding the Xayaburi project, but Pöyry was reluctant to give interviews on the subject.<sup>110</sup>
- 2) During its Annual General Meeting on March 8 2012, Pöyry responded to the same reporter’s questions by announcing it will not take a stance on how its services or the Xayaburi compliance report is used.<sup>111</sup>
- 3) During a seminar on Finnish development policy and corporate responsibility in the Mekong region, arranged on April 3 2012, this same stance was reiterated.<sup>112</sup>

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<sup>107</sup> Pöyry Code of Conduct 2010, p. 2

<sup>108</sup> *ibid.*, p. 3

<sup>109</sup> International Rivers, 9 November 2011: “Laos uses new report to greenwash the Xayaburi dam”, <http://www.internationalrivers.org/resources/laos-uses-new-report-to-greenwash-the-xayaburi-dam-3699>

<sup>110</sup> YLE News, 7 July 2011: “Laosin patohankkeet koettelevat myös Suomen mainetta”, [http://yle.fi/uutiset/laosin\\_patohankkeet\\_koettelevat\\_myos\\_suomen\\_mainetta/2708481](http://yle.fi/uutiset/laosin_patohankkeet_koettelevat_myos_suomen_mainetta/2708481)

<sup>111</sup> YLE Radio News, 9 March 2012

<sup>112</sup> Mika Pohjonen, Pöyry Plc, 3 April 2012, Mekong seminar

- 4) After this seminar, Pöyry was reluctant to continue the dialogue started in the seminar, as its representative stated that Pöyry's responsibilities regarding the Xayaburi hydropower project ended with the writing of the compliance report and the critical remarks made in it<sup>113</sup>.

Due to Pöyry's reluctance to engage in a meaningful dialogue with both the public and the relevant stakeholders, it is clear that this case needs to be taken into consideration in the Finnish National Contact Point in order to start a meaningful dialogue.

## Concrete breaches of the OECD Guidelines

The Complainant argues that the services provided for the Xayaburi hydropower project violate many of the OECD Guidelines for example in the Chapters on General Policies, Human Rights and Environment.

### General Policies

According to the OECD Guidelines, multinational companies are expected to...

- Paragraph A.1: "contribute to economic, environmental and social progress with a view to achieving sustainable development"<sup>114</sup>
- Paragraph A.11: "avoid causing or contributing to adverse impacts on matters covered by the *Guidelines*, through their own activities, and address such impacts when they occur"<sup>115</sup>
- Paragraph A.12: "seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship"<sup>116</sup>
- Paragraph A.13: "in addition to addressing adverse impacts in relation to matters covered by the *Guidelines*, encourage, where practicable, business partners... to apply principles of responsible business conduct compatible with the *Guidelines*"<sup>117</sup>

The comments to Paragraph A. 14 argue that "The Guidelines concern those adverse impacts that are either caused or contributed to by the enterprise, or are directly linked to their operations, products *or services* by a business relationship, as described in paragraphs A.11 and A.12". Further "contributing to" is, according to the Guidelines, to be interpreted "as a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact,

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<sup>113</sup> Keva.fi, 5 April 2012: "Järjestö: Pöyry toimii Mekongilla kuin asekauppias", <http://www.kepa.fi/uutiset/9084>

<sup>114</sup> *ibid.*, p. 19

<sup>115</sup> *ibid.*, p. 20

<sup>116</sup> *ibid.*

<sup>117</sup> *ibid.*

and does not include minor or trivial contributions.”<sup>118</sup> The Complainant argues that this condition is thoroughly fulfilled in the Pöyry case.

Pöyry also should have taken further steps to mitigate its impact. The Guidelines stipulate that “If the enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm.”<sup>119</sup> The Lao Government and the Xayaburi Power Company could arguably not have moved ahead with the project as planned if the other member states *and* the prestigious Pöyry would have all recommended to study impacts further and to continue consultations before moving ahead with the controversial project.

The expectation in paragraph A.12 would entail “an enterprise [...] as appropriate to use its leverage to influence the entity causing the adverse impact to prevent or mitigate that impact.” Even though Pöyry suggests 40 new studies to be conducted, there is little in the way of evidence that these mitigation measures suffice to reach good standards, especially as the work of Pöyry has been subjected to great amount of critique.

Pöyry has publicly referred to confidentiality in not discussing the matter in public and not giving out interviews.<sup>120</sup> The Guidelines recognize that enterprises can also exert influence through contractual arrangements.<sup>121</sup> As Pöyry was entering an international water dispute it should not enter into a contract with one party. Even though confidentiality clauses can be considered standard in the sector of work, they are a starting point that a company with due diligence would not enter in the framework of the Xayaburi Dam after the April 2011 Council meeting. The Guidelines bring out a number of options in Commentary 22, where the full range from mitigation to temporary or permanent suspension of business relationship is being presented. If Pöyry found itself in an impossible task it should simply have discontinued its relationship.<sup>122</sup> The approach selected by Pöyry is also in contradiction of its own principles of stakeholder engagement, and considerably decreases trust in the processes that Pöyry have in place and their efficiency.

Pöyry considers itself to be “one of the world's leading hydropower engineering service providers”. When describing itself, Pöyry states: “Having worked with a number of clients worldwide in diverse, multicultural working environments we are able to fulfill different roles as your preferred partner... We bring to each hydropower project experience gained through our involvement in an accumulated total installed capacity exceeding 100'000 MW. Our vast reserve of know-how means

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<sup>118</sup>*ibid.* p.23

<sup>119</sup>*ibid.* p.24

<sup>120</sup><http://yle.mobi/w/uutiset/ulkomaat/ns-yduu-3-2708481>; See also chapter “Prior attempts at engaging Pöyry in dialogue”

<sup>121</sup>OECD Guidelines for Multinational Enterprises, p. 24 Commentary 21

<sup>122</sup>*ibid.*, p. 25 Commentary 22 states: “Appropriate responses with regard to the business relationship may include continuation of the relationship with a supplier throughout the course of risk mitigation efforts; temporary suspension of the relationship while pursuing ongoing risk mitigation; or, as a last resort, disengagement with the supplier either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact. The enterprise should also take into account potential social and economic adverse impacts related to the decision to disengage.”



that we have the necessary expertise needed to make your project a success. Whatever the challenge we will provide the right solution for you.”<sup>123</sup> It seems as though this tailoring of services is currently overriding Pöyry’s own sustainability agenda: it does not consider the nature of its customers or deals to affect the nature of its services. On this particular point the Complainant seeks guidance from the Specific Instance as the Complainant believes that Pöyry’s internal processes of responsibility have proved inadequate.

Even though the decision to go on with the Xayaburi Dam lies entirely on the Governments of Lao PDR, Cambodia, Thailand and Viet Nam and the MRC, if following the Guidelines, Pöyry should have addressed and emphasized the fact that at least because of the lack of sufficient baseline data and the precautionary principle the project cannot go forward. Pöyry should have used the “leverage” given to it by Lao PDR “to influence the entity [in this case Lao PDR and the Xayaburi Power Company] causing the adverse impact to prevent or mitigate that impact”<sup>124</sup>. According to Commentary 19, “leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm”<sup>125</sup>. Through its recommendations Pöyry also encourages Lao PDR to violate the 1995 Mekong Agreement and the OECD Guidelines, which is in direct contradiction with the Paragraph A.13.

### **Failing to engage with relevant stakeholders**

Using leverage is further underlined by the demand in the Guidelines for “engagement with relevant stakeholders, through, for example, meetings, hearings or consultation proceedings”<sup>126</sup>. In this instance Pöyry has undermined these processes instead of furthering them, and has to the knowledge of the complainants not even notified the MRC about its work, which is the body commissioned by the Lower Mekong governments to co-ordinate work in this field (as Pöyry must have known). The consultation processes are particularly mentioned to be relevant in activities concerning the use of water, “which could significantly affect local communities.”<sup>127</sup>

Companies are in the environmental chapter obliged under the Guidelines to “engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation”<sup>128</sup>. The companies further should “engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities”<sup>129</sup>. However, Pöyry has undermined a process of further consultation instead of supporting or recommended it to go on. Particularly, the Pöyry report has been used to stop the consultation process and fast-track financing, approval and construction of the Xayaburi hydropower project, without the company using its leverage to mitigate or hinder this usage. Instead of improving opportunities of stakeholders to participate, as the complaint recommends, Pöyry thus undermines the possibilities

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<sup>123</sup> <http://www.poyry.com/sectors-services/hydropower/hydropower>

<sup>124</sup> OECD Guidelines, p. 24, Commentary 20 on paragraph A.12

<sup>125</sup> *ibid.*, p. 24

<sup>126</sup> *ibid.*, p. 25

<sup>127</sup> *ibid.*, p.25. Commentary 24

<sup>128</sup> *ibid.*, p. 42

<sup>129</sup> *ibid.*, p.20

of stakeholders, at all levels, to participate in a key process regarding the future of the Lower Mekong Region.

## Chapter on Human Rights

Considering the principles of the Guidelines chapter on Human Rights, the above mentioned Paragraphs on General Policies can all be seen reiterated in this chapter. The 2<sup>nd</sup> and 3<sup>rd</sup> Paragraphs are clearly violated in the Pöyry case.

According to these Paragraphs, multinational companies should...

- Paragraph 2: “within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur”<sup>130</sup>
- Paragraph 3: “seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts”<sup>131</sup>

These Paragraphs can be interpreted and applied in the case of Pöyry virtually the same way as the above mentioned Paragraphs of General Policies. Pöyry does not address any but a few of the human and social impacts of the dam, and considering that most of the human and social impacts are indirect and caused by changes and decline in fisheries and sediment flows, Pöyry is contributing to the adverse human and social impacts. Through the report, Pöyry has encouraged the Lao government to go ahead with untested and inadequate mitigating measures that would require further study in the context of Lower Mekong mainstream.

It should also be noted, like the Commentaries 37, 38 and 40 state<sup>132</sup>, that inadequate in-country laws or government’s unwillingness to respect human rights are not excuses for companies not to comply with international standards, especially with regard to concern for the many vulnerable populations and ethnic groups of the Mekong Sub-region. This is highly relevant with regards to impacted people both in Cambodia and Lao PDR.

## Chapter on Environment

The chapter on Environment begins by stating that “enterprises should... take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development”<sup>133</sup>. Pöyry’s recommendations for the Xayaburi Dam project contradict this principle, as can be seen in application of the Guidelines above.

The following Paragraphs of the Environmental Chapter in the Guidelines are violated in the Pöyry case:

Multinational companies are expected to...

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<sup>130</sup>*ibid.*, p. 31

<sup>131</sup>*ibid.*

<sup>132</sup>*ibid.*, p. 31–32

<sup>133</sup>*ibid.*, p. 42

- Paragraph 4: “consistent with the scientific and technical understanding of the risks, where there are threats of serious damage to the environment, taking also into account human health and safety, not use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimize such damage”<sup>134</sup>
- Paragraph 6: “continually seek to improve corporate environmental performance, at the level of the enterprise and, where appropriate, of its supply chain, by encouraging such activities as...”
  - o 6b) “development and provision of products or services that have no undue environmental impacts... (and) are efficient in their consumption of energy and natural resources”
  - o 6c) “promoting higher levels of awareness among customers of the environmental implications of using the products and services of the enterprise, including, by providing accurate information on their products (for example [...] biodiversity [...] or other environmental issues)”<sup>135</sup>
- Paragraph 8: “contribute to the development of environmentally meaningful and economically efficient public policy, for example, by means of partnerships or initiatives that will enhance environmental awareness and protection”<sup>136</sup>

Interpreting Paragraph 4, Pöyry should have recommended and can still publicly recommend that the Xayaburi Power Company or the Government of Lao PDR should gather all of the baseline data needed before any construction begins or continues. Pöyry should not have relied on guesswork and irresponsibly tried to convince that the mitigation design based on studies conducted after the construction has already begun would be adequate. This violates the precautionary principle.

Interpreting Paragraph 6 from a viewpoint of service providing enterprises, it can be argued that Pöyry should have at least acknowledged that it has no real and fit solutions to a dam designed to be built on the Lower Mekong Mainstream, if it cannot itself develop and provide technologies that have no severe and undue environmental impacts, instead of relying on guesswork based on experiences in very different contexts to that of Mekong, such as rivers in Europe and North America. It can also be argued that Pöyry should have encouraged its business partners or clients (Lao PDR and the Xayaburi Power Company) to develop and provide better and more suitable technologies to damming the Mekong Mainstream or, better yet, to develop other more sustainable ways to produce energy. Both Pöyry and the Xayaburi Dam contractor or the Government of Lao PDR should have provided more accurate and adequate information on the environmental (and social) impacts of the Xayaburi Dam. They did not emphasize even the indubitable negative impacts enough, thus concealing information from MRC and the civil society of Lower Mekong.

According to Paragraph 8, as Pöyry had the opportunity, it should have contributed to the development of public policy in Lao PDR. It had the opportunity for what the Guidelines define as a

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<sup>134</sup>*ibid.*, p. 43

<sup>135</sup>*ibid.*

<sup>136</sup>*ibid.*, p. 44

“demonstration effect”<sup>137</sup>, but it did not take it, even though Pöyry considers itself a “global thought leader” to be<sup>138</sup>.

## World Commission on Dams

Additionally, the Xayaburi dam is inconsistent with emerging international best practice on large dams. For example, the design and process for the Xayaburi project ignores several of the central issues identified by the 2000 report of the World Commission on Dams (“WCD”), including:

- The core values of participatory decision making and sustainability;<sup>139</sup>
- The strategic priority of managing and taking into account existing dams;<sup>140</sup>
- The strategic priority of sustaining rivers and livelihoods, and minimizing harm to ecosystems,<sup>141</sup> including avoiding mainstream dams and impacts on endangered species where possible;<sup>142</sup>
- The strategic priority of providing for adequate mitigation and development opportunities for affected persons;<sup>143</sup>
- The strategic priority of sharing rivers across boundaries for “peace, development and security”<sup>144</sup>

These values and priorities, while they have not necessarily crystallized as international law, are widely respected internationally and have been incorporated into domestic and international legal and quasi-legal regimes. For example, a number of countries, including Viet Nam, have initiated processes to incorporate the WCD recommendations into their national policies.<sup>145</sup> The OECD and the European Union have issued statements on hydropower recognizing the value of the strategic priorities for their decisions to grant export credits.<sup>146</sup> Several nations, including Switzerland<sup>147</sup> and the United States<sup>148</sup> incorporate the WCD strategic priorities in their assessment processes for granting government assistance to companies involved in dam projects. And the European

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<sup>137</sup>*ibid.*, see commentary 72, p. 46

<sup>138</sup> See e.g. Pöyry Annual Report 2011, p. 16

<sup>139</sup>World Commission on Dams, *Dams and Development: A New Framework for Decision-Making* 199 (Nov. 2000)

<sup>140</sup>*ibid.* at 225–233.

<sup>141</sup>*ibid.* at 234–239

<sup>142</sup>*ibid.* at 267

<sup>143</sup>*ibid.* at 240–243

<sup>144</sup>*ibid.* at 251–256.

<sup>145</sup>United Nations Environment Programme, Dams and Development Project, Vietnam, at <http://www.unep.org/dams/documents/Default.asp?DocumentID=366>

<sup>146</sup>Organization for Economic Cooperation and Development (OECD), Statement on export credits and hydropower projects, Nov. 15, 2005, available at [http://www.oecd.org/document/41/0,3746,en\\_2649\\_34181\\_35688937\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/41/0,3746,en_2649_34181_35688937_1_1_1_1,00.html)

<sup>147</sup>Schweizerische Exportrisikoversicherung (SERV), *SERV guidelines for reviewing environmental and social issues 2* (Nov. 2010), available at [http://www.serv-ch.com/fileadmin/serv-dateien/Ethik-Umwelt/e/guidelines\\_environmental\\_and\\_social\\_issues.pdf](http://www.serv-ch.com/fileadmin/serv-dateien/Ethik-Umwelt/e/guidelines_environmental_and_social_issues.pdf)

<sup>148</sup>Overseas Private Investment Corporation, *OPIC Environmental & Social Review – Dam Projects* (Apr. 2004), available at [http://www.opic.gov/sites/default/files/docs/dam\\_review\\_procedures.pdf](http://www.opic.gov/sites/default/files/docs/dam_review_procedures.pdf)

Investment Bank and the European Bank for Reconstruction and Development have announced that they will take the WCD recommendations into account when funding projects.<sup>149</sup>

In addition to these concerns, there are additional concerns relating to the OECD Guidelines' Chapter on Consumer Interests, which can fruitfully be followed.<sup>150</sup>

## The Breakdown of due process under Mekong agreement

If the Pöyry Group supports and provides a fundamental service to a project that will move ahead unilaterally by Lao PDR (with Thailand purchasing the electricity generated), before all MRC countries have agreed to the end of the consultation process, the company would be complicit in a breach of the 1995 Mekong Agreement. The 1995 Mekong Agreement requires riparian member states to coordinate and provide information on uses of the river and its resources, with the aim of ensuring “reasonable and equitable utilization”<sup>151</sup>, environmental protection<sup>152</sup>, and prevention of harmful effects<sup>153</sup>. To that end it authorizes the development of a mechanism for mutual consultation and notification<sup>154</sup>. This mechanism is the Procedures for Notification, Prior Consultation and Agreement (“PNPCA”), a process governed by the principle of “reasonable and equitable utilization” and the mutual sense that no member state has the right either to veto any use of the river, or to unilaterally use it without taking the views of other states into account<sup>155</sup>. The

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<sup>149</sup>Press Release, International Rivers, European Public Banks Accept World Commission on Dams Recommendations (Oct. 6, 2005), at <http://www.internationalrivers.org/node/1341>

<sup>150</sup>The chapter on Consumer Interests is meant to diminish potential harm to the consumer, which in this case (strictly speaking) is the Lao government. However, the government is supposed to represent the Lao people, and thus the consumer interests can be interpreted to include the interests of Lao people. Also, as Lao PDR is using the Pöyry report to get ahead with the decision making process in the MRC (which was clear to Pöyry from the very beginning), the MRC and its member countries can be considered as consumers or clients too. The most relevant paragraphs of this chapter are the following:

Multinational companies should...

- Paragraph 2: “provide accurate, verifiable and clear information that is sufficient to enable consumers to make informed decisions...” (see also paragraph 5)
- Paragraph 4: “not make representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent or unfair”

Pöyry’s compliance report is found to be full of biases and inconsistencies, and thus the information on whether the Xayaburi dam’s plans and assessments being in compliance with the MRC Guidelines or not is inadequate and insufficient. Based on Pöyry’s compliance report alone, a truly informed decision cannot be made. Relying on this report is not safe.

In its inadequate compliance report, Pöyry makes omissions and representations that are deceptive and misleading. The suggestions of designing mitigation methods based on baseline data gathered after the construction of the dam is already underway are the most misleading. This creates a misleading presumption that the dam’s impacts can be mitigated, even though there is scientific debate if this will ever be possible in a river like the Lower Mekong Mainstream. Pöyry has also made deceptive misrepresentations of its own services, representing itself as an environmentally conscious service provider.

<sup>151</sup>Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin art. 5, April 5, 1995, 34 I.L.M. 864 (“Mekong Agreement”)

<sup>152</sup>*Ibid.* art. 3

<sup>153</sup>*Ibid.* art. 7

<sup>154</sup>*Ibid.* art. 26

<sup>155</sup>MRC Technical Review, p. 2

1995 Mekong Agreement requires that any prior consultation process include both timely notification and the provision of sufficient information to allow other riparian members to “discuss and evaluate the impact of the proposed use” of the river<sup>156</sup>.

Lao PDR’s unilateral declaration of fulfillment of its PNPCHA obligations violates the 1995 Mekong Agreement in at least two ways. First, the 1995 Mekong Agreement’s definition of “prior consultation” includes the provision of adequate information for riparian states to be able to evaluate the potential impacts of a proposed use of the Mekong’s water. Objections to the Xayaburi Dam have been registered by Cambodia<sup>157</sup>, Thailand<sup>158</sup> and Viet Nam<sup>159</sup>, and noting that a lack of crucial information undermines their ability to evaluate the project accurately. Lao PDR’s unilateral withdrawal from the PNPCHA can thus only be seen as a violation of the requirement to provide adequate and timely information.

Second, Lao PDR is under treaty obligations to refrain from unilaterally declaring the PNPCHA process complete. As a party to the Vienna Convention on the Law of Treaties, Lao PDR is obligated to follow through on all of its treaty obligations in good faith.<sup>160</sup> This includes the 1995 Mekong Agreement. Lao PDR must also interpret the Mekong Agreement in good faith, reading all terms in their ordinary meaning, in the context of the Mekong Agreement, and in light of their object and purpose.<sup>161</sup> There are no terms in the Mekong Agreement or in the PNPCHA whose ordinary meaning empowers a member to unilaterally declare the PNPCHA process complete. The object and purpose of the Mekong Agreement includes cooperating with member countries in a “constructive and mutually beneficial manner [for] the sustainable development, utilization, conservation and management of the Mekong River basin.”<sup>162</sup> Thus Lao PDR is required to consult in good faith, with the aim of reaching an agreement on optimal use. Moreover, Lao PDR agreed to table the decision on the status of the PNPCHA process at the MRC Special Joint Committee meeting on April 19, 2011, pending further talks at the ministerial level. A unilateral declaration that the PNPCHA process is complete amounts to a refutation of this decision, and would contravene the object and purpose of the 1995 Mekong Agreement.

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<sup>156</sup>Mekong Agreement, *supra* note 151, ch. II, para. 8

<sup>157</sup>Kingdom of Cambodia, *Form/Format for Reply to Prior Consultation* (Apr. 2011) available at <http://www.mrcmekong.org/news-and-events/consultations/proposed-xayaburi-hydropower-project-prior-consultation-process/> (noting lack of sufficient information disclosure for stakeholder consultations, need for transboundary and cumulative impact studies, lack of clarity on mitigation measures and benefit sharing to affected countries, and failure to explain how the Project Review Report’s recommendations are being taken into account, and recommending extension of PNPCHA).

<sup>158</sup>Kingdom of Thailand, *Form/Format for Reply to Prior Consultation* (Apr. 2011), available at <http://www.mrcmekong.org/news-and-events/consultations/proposed-xayaburi-hydropower-project-prior-consultation-process/> (noting lack of baseline studies, inadequate information on mitigation measures, and lack of clarity on sustainability of project, and requesting extension of PNPCHA).

<sup>159</sup>Socialist Republic of Viet Nam, *Form/Format for Reply to Prior Consultation* (Apr. 2011) , available at <http://www.mrcmekong.org/news-and-events/consultations/proposed-xayaburi-hydropower-project-prior-consultation-process/> (noting lack of assessment of transboundary and cumulative impacts and failure to quantify impacts, and recommending 10 year deferral of dam construction).

<sup>160</sup>Vienna Convention on the Law of Treaties art. 26, May 23 1969, 1155 U.N.T.S. 331

<sup>161</sup>*Ibid.* art. 31

<sup>162</sup>Mekong Agreement, *supra* note 151, preamble para. 5

The conscious decision by Pöyry to sideline the PNPCA process can only be seen to be thoroughly in contradiction with the OECD Guidelines' chapters of causing no harm, using its leverage to affect its partners and also with the points highlighted in the stakeholder parts of the guidelines, where the following points are stated.

In the case of Xayaburi compliance review, Pöyry has failed to even engage the MRC, the leading authority and central stakeholder on dams with trans-boundary impacts. Pöyry's work has directly undermined efforts to engage other relevant stakeholders, as Lao PDR has used its report to argue that the PNPCA process is effectively over.

### **How Finnish development policy is being undermined by Pöyry's work**

The Finnish Ministry of Foreign Affairs has provided support to regional co-operation, most notably through the Mekong River Commission (MRC) and the financing of the acclaimed Strategic Environmental Assessment of the cumulative impacts of proposed Mekong mainstream hydropower projects, and more broadly, to efforts supporting food security and sustainable development.

Pöyry's services to Lao PDR regarding the Xayaburi hydropower project and the way they have been used to undermine Finnish development co-operation in the Mekong region<sup>163</sup>, and thus lead to a waste of Finland's public funds.

Furthermore, the OECD Guidelines advise OECD countries to bring the behavior of multinational enterprises "in harmony with government policies"<sup>164</sup>, which makes this Specific Instance even more important to be considered and dealt in the Finnish National Contact Point.

### **Requirements for Pöyry to mitigate damage**

The Complainant requests that a process be initiated with the aim of correcting Pöyry's behavior, mitigating the damage already caused, and pre-empting further damage in the Xayaburi case (as is now imminent) through public statements and engagement in dialogue with relevant stakeholders.

The Complainant demands that Pöyry

- 1) publicly states areas of non-compliance in the Xayaburi dam project;
- 2) publicly clarifies which studies are needed before any construction that would impact the river basin takes place;
- 3) publicly endorses the Strategic Environmental Assessment commissioned by the MRC;
- 5) enters a meaningful dialogue with civil society partners on what kind of consultancy and services a responsible company can engage in; with regards to hydropower development in the Mekong region;
- 6) commits itself not to get involved in any further Mekong mainstream dams

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<sup>163</sup> See chapters under "What impacts are imminent"

<sup>164</sup> OECD Guidelines, p. 13

7) should fund a performance bond to be set aside immediately for those harmed by the Xayaburi Dam;

8) should repay the Finnish government to the total amount of Finnish support to the MRC and the support to the drafting of the SEA report over the last 5 years.



# ANNEX I

Here are listed all the organizations, which have joined the Specific Instance as complainants by June 18 2012. The full list of complainants will be submitted to the Finnish NCP by July 6 2012.

## NGOs bringing this Specific Instance in front of the Finnish National Contact Point

The lead complainant is Siemenpuu Foundation, whose Mekong Group has compiled this Specific Instance.

**The Siemenpuu Foundation** was founded in 1998 by 15 Finnish non-governmental organisations (NGOs) or foundations working with questions linked to the environment and development. It supports civil society organizations in developing countries working for ecological democracy, environmental protection and prevention of environmental threats. It has a task of publicizing and informing the Finnish public on these organizations' work to Finland. The Foundation has a number of Finnish regional working groups. The Siemenpuu Mekong group has been requested by several groups in the developing countries' of the Mekong region to join the present complaint: and has the interest of bringing these groups' voices to the process.

**Friends of the Earth Finland** (Maan ystävät ry) is a non-governmental organization established in 1996. Friends of the Earth is an environmental NGO with a social perspective. It is part of the Friends of the Earth International network, which has more than a million members in 70 countries from all over the world. The organization works to create a more just, equal and ecologically sustainable world, and for this aim Friends of the Earth Finland organizes actions, protests, debates, lectures and produces material. Friends of the Earth has the direct interest of holding companies accountable and pursuing agendas of sustainability for better life in all parts of the Globe.

**Finnish Asiatic Society** (Aasian Ystävät ry) was founded in 1993 and is an academic association for people, who are interested in Asian countries and cultures. The association is religiously and politically independent. Memberships are based on recommendations and expertise. Finnish Asiatic Society has organized seminars and published books on topical Asian issues, such as politics, economy, environment, human rights and culture. For further advancing the Finnish knowledge on Asian issues, the association created a Finnish web site, [www.aasia.info](http://www.aasia.info).

**International Rivers (IR)** is a non-governmental organization that protects rivers and defends the rights of communities that depend on them. IR works to oppose destructive dams and the development model they advance, while encouraging better ways of meeting people's needs for water, energy, food and protection from damaging floods.

**Community Resource Center (CRC) in Thailand** has been founded to promote empowering of local people and communities standing to be affected by large scale development projects that often have negative environmental and social impacts. This is made through, e.g., making people aware of their fundamental rights and basic laws, and enforcing these laws more effectively. It is hoped that through the efforts of CRC, local people shall have access to good quality of life and be able to engage themselves in the preservation of natural resources and the environment. With that,

sustainable development shall be made possible with respect for human rights, community rights, and the importance of natural preservation. Laws, human rights principles and justice process can then be utilized to promote protection work. It is also believed that there should be alternative channels, including electronic media, through which people can complain against concerned governmental offices in order that they get informed of the problems and make attempts to solve the problems before the case reaches the Court. It should help to address the problems effectively and avoid any potential conflict or violence. And it should make more people in society become concerned and active in addressing the problems. Through this, sustainable development based on genuine participation of people can be possible.

**Vietnam Rivers Network (VRN)** is an open forum whose membership comprises a broad set of actors concerned with river protection and sustainable development in Vietnam, including NGOs, researchers, academics, government officials, local communities, individuals, etc. VRN works to protect the health of river ecosystems and watersheds to sustain biodiversity and the livelihoods of river-dependent communities through sharing information, implementing research on the social and environmental impacts caused by hydropower projects and other development projects related to water resources in Vietnam and in the region. VRN also conducts advocacy work in these fields.

**Berne Declaration** is a Swiss non-governmental organization with 22,000 members. It has been promoting more equitable, sustainable and democratic North-South relations since 1968. It asks Swiss corporations, banks, export risk agencies, and government agencies to act in a socially and ecologically responsible manner around the world and encourage them to take a leading role in promoting equitable development, respect human rights and environmental and social standards in their policies and projects.

**Buddhist Association for Environmental Development (BAED), Working for Development, Environment and Peace** is a Cambodian NGO, made up of Buddhist monks and professionals who are interested in the conservation of natural resources. It recognizes the importance of the inputs of the people in the form of knowledge, experiences and suggestion to influence development projects so they can lead to maximum benefits to the communities. It strongly believes in non-discrimination, environmental preservation, non-violence and respecting women. It encourages volunteer work and co-operation among the NGOs, NGOs partners and other partners in the local and international communities. BAED does not believe in destroying wildlife through human consumption. BAED is working actively on the case of Xayaburi Dam through a series of public forums at communes, districts, and town of Kampong Cham Province. In the end of June 2012 BAED is planning to organize a peace walk (Dharma Yatra) in the central province of Kampong Cham with participation of around 1000 people to show its peaceful opposition to the Xayaburi Dam.

NGOs' logos



SIEMENPUU



**BD**

Berne Declaration  
Déclaration de Berne  
Erklärung von Bern



## ANNEX II

### Our analysis of how impacts on fisheries, sediments and people were considered in the Pöyry report

It should be noted that this analysis not comprehensive.

In line with Article 2 of the 1995 Mekong Agreement, the Mekong River Commission (MRC) formulated “a consistent approach to evaluate the design, operation, impact and mitigation measures for any proposed mainstream dam”, which resulted in the publication in August 2009 of the “MRC Preliminary Design Guidance for Proposed Mainstream Dams in the Lower Mekong Basin”. It sets forth specific requirements related to fish passage, sediment transport and river morphology, water quality and aquatic ecosystems, dam safety, and navigation systems. The MRC’s 2011 technical review of the Xayaburi Dam identifies recommendations and areas of non-compliance based on the project developer’s reports and studies by expert panels.<sup>165</sup>

Pöyry also acknowledges and identifies many gaps in scientific and technical baseline data, which has to be collected for the dam to be in compliance with the MRC Guidelines for dams in Lower Mekong Mainstream<sup>166</sup>. Without this baseline information, it is also impossible to determine credible mitigation measures<sup>167</sup>. Pöyry claims this data can be gathered during the early construction phase, and thus the additional mitigation measures and designs can be adapted in the dam<sup>168</sup>. However, International Rivers has identified at least fifteen fundamental MRC requirements with which the Xayaburi dam still does not comply, and the Pöyry report omits mention of many of these requirements<sup>169</sup>. Despite all this, Pöyry finds the Xayaburi dam “has principally been designed in accordance with the applicable MRC Design Guidelines” and thus the construction of the Xayaburi dam can proceed<sup>170</sup>.

#### *Fish and fisheries*

On several occasions, the Pöyry report acknowledges major gaps in knowledge about fisheries impacts, even stating that “the missing baseline data concerning fish species, migration pattern, behavior, swimming ability, biomass, economic value, etc, should be carried out with the utmost urgency to allow the design changes within the existing time frame”<sup>171</sup>. Pöyry claims that any baseline studies can be conducted and mitigation measures designed after construction on the Xayaburi dam is already underway. To conduct an appropriate fish baseline study, according to the report, would take only two years, although this would not tell anything about the trans-boundary impacts.<sup>172</sup> Pöyry’s approach runs contrary to established science. Because construction activities

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<sup>165</sup> MRC technical review; IR review, p. 8

<sup>166</sup> Pöyry Report

<sup>167</sup> IR Review, p. 4

<sup>168</sup> Pöyry Report

<sup>169</sup> IR Review, p. 4 & Annex 2

<sup>170</sup> Pöyry Report, p. 14

<sup>171</sup> *ibid.*, p. 26

<sup>172</sup> *ibid.*, see e.g. p. 14, and generally p. 25-26

can affect the river, baseline data need to be collected before construction in order to accurately assess a project's impacts.<sup>173</sup>

Despite lacking adequate baseline data, Pöyry recommends “fish passage” technology as the solution to allow migrating fish to pass over the dam<sup>174</sup>. Fish passages have been used in dam projects around the world, but need to be designed to match local conditions such as the range of fish species, number of migrating species at a given time, behavior of these species, height of the dam, variations in river flow, and cumulative impacts of fish passing through multiple dams along the river, among other factors<sup>175</sup>. The technology that Pöyry proposes has only been used in Europe and North America, and has not been tested for the unique conditions, massive fish migrations, and biodiversity of the Mekong River Basin<sup>176</sup>. In 2008, a group of fisheries experts convened by the MRC concluded “that there is currently no evidence that fish-passage facilities used in large tropical rivers in Latin America, Africa and Asia can cope with the massive fish migrations and high species biodiversity in the Mekong.”<sup>177</sup> Based on the opinions of fisheries experts, the MRC expressed concern that “effective fish passage at Xayaburi would need to pass a migratory biomass that is likely to be much higher than previously recorded in any fish-passage facility globally.”<sup>178</sup>

Because of the risk that dams can block critical fish migrations, the MRC requires projects to incorporate a fish passage technology that ensures safe passage for 95 percent of target species through the dam site under all flow conditions<sup>179</sup>. Pöyry does not consider, or even mention, the 95

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<sup>173</sup> IR Review, p. 10

<sup>174</sup> Pöyry Report, p. 27-28

<sup>175</sup> IR Review, p. 11

<sup>176</sup> **Patrick Dugan: Mainstream dams as barriers to fish migration: international learning and implications for the Mekong. Catch and Culture 2008, vol. 14, no. 3**

<sup>177</sup> Dugan 2008. According to the IR Review, p. 11-12, the MRC brought together a group of seventeen international experts on fisheries and fish passes in September 2008. The group concluded: “(i) Existing mitigation technology cannot handle the scale of fish migration on the Mekong mainstream; (ii) If dams are built upstream and on tributaries, specific mitigation measures should be designed from the start and integrated into dam engineering and operation; (iii) In considering the design of mitigation measures existing off-the-shelf designs cannot be used, but the basic concepts used in developing these can be drawn upon; (iv) These experts also recognized that the ability to provide the partial mitigation measures seen in North America and Europe has been dependent on substantive site-specific research and development over several decades, and that similar investments will be needed in the Mekong.” The group further noted that, “best evidence from South America (Oldani & Baigin 2002) is that the success of fish ladders and lifts there is low even though the number of species and volume of migration there is lower than in the Mekong”; Similarly, “the group agreed that the technologies used on high dams in North America and Europe (mainly fish ladders and fish lifts) have been developed for a very limited range and number of fish species (generally about 5 to 8 species). Most of this experience has been with salmonid fish which have remarkable jumping abilities that enable them to scale waterfalls and fish ladders more successfully than any other group of fish. Biomass of fish involved is relatively small, at around 3 million fish per year on the Columbia River in the USA. This experience from North America and Europe contrasts with the Mekong where there are at least 50 important migrant species, none of which are salmonids, and biomass is in the order of 100 times greater”; Furthermore, “on the basis of this analysis of available information, the meeting concluded that current fish-passage technology would not be effective in maintaining the migration of the large number and diverse fish species found in the Mekong.”

<sup>178</sup> MRC technical review, p. 25

<sup>179</sup> IR review, p.4

percent requirement, and assumes that any impacts can be mitigated using technologies that have never been tested for Mekong fish species or ecosystems<sup>180</sup>. A fish passage solution is proposed in uncertain terms: it is “state of the art and has a very complex design, but it needs to be taken into account that the basic knowledge concerning the fish species of the Mekong River, their swimming ability and behavior needs to be greatly improved”<sup>181</sup>. This and other unproven measures are being promoted despite strong scientific evidence from fishery experts around the world that no technology exists to effectively mitigate Mekong Mainstream Dams’ impacts on the river’s fisheries<sup>182</sup>. As Pöyry itself states, “the knowledge concerning the specific requirements of the aquatic fauna on the fish passage facilities is not sufficient”<sup>183</sup>. In addition, both the MRC and Pöyry found that there is not enough understanding of impacts to develop adequate compensation measures for affected communities who will suffer fishery losses<sup>184</sup>.

### *Sediments*

The MRC requires dams to regulate sediment flows in a way that mimics natural conditions<sup>185</sup>. Pöyry proposes a technology called “flushing outlet” for mitigating risks to sediment loss, while simultaneously acknowledging that the river’s natural sediment flows have not been studied<sup>186</sup>. As the natural sediment transport conditions are still unknown, Pöyry’s recommendations amount to guesswork<sup>187</sup>. The report acknowledges this, explaining that Pöyry’s “approach...is based on a semi-quantitative assessment of available information and does not include any results from own numerical or physical modeling”<sup>188</sup>. As if to emphasize that its recommendations are based on guesswork, Pöyry states that “physical [and] numerical modeling is recommended in terms of verifying and refining the foreseen measurements”<sup>189</sup>. Pöyry also omits considering the ecological impacts of the flushing outlet technology it proposes<sup>190</sup>, even though MRC’s technical review addresses this issue<sup>191</sup>.

Pöyry mentions that “it would be important to understand the influence of the upstream developments in China and have data covering the start of the operation period of these schemes”<sup>192</sup>. Without more careful investigation, Pöyry’s models potentially fail to capture the reality of sediment transport conditions in the Lower Mekong mainstream<sup>193</sup>.

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<sup>180</sup> Pöyry Report; see also IR Review, p. 4

<sup>181</sup> Pöyry Report, p. 23; IR Review, p. 11

<sup>182</sup> Pöyry Report; see also IR Review, p. 4

<sup>183</sup> Pöyry Report, p. 25

<sup>184</sup> Pöyry Report, p. 26; MRC technical review, see e.g. p. 32 and 35

<sup>185</sup> MRC Preliminary Design Guidance, p.22, para. 120

<sup>186</sup> Pöyry Report, p. 37-38 & 41-42

<sup>187</sup> IR review, p. 14

<sup>188</sup> Pöyry Report, p. 30

<sup>189</sup> *ibid.*, p. 42

<sup>190</sup> See e.g. Pöyry Report, p. 35

<sup>191</sup> MRC’s Technical Review, p. 50 & 53

<sup>192</sup> *ibid.*

<sup>193</sup> See also IR review, p. 15

### *Human and social impacts*

Because of significant impacts on fisheries and sedimentations, Xayaburi dam affects indirectly on millions of people's lives and livelihoods. Dam has also direct impacts due to displacement of people.

When impacts on fisheries cannot be mitigated, the MRC requires the developer to provide adequate compensation<sup>194</sup>. Pöyry notes the project developer's lack of a compensation program for affected people who rely on fisheries, stating that "baseline data, like how many people and to which extent are using the aquatic fauna and flora including any depending businesses, need to be developed and investigations on trans-boundary effects also need to be carried out in the forthcoming project phase"<sup>195</sup>. Gathering such baseline data during the construction phase, when impacts are already happening, would undermine the intent of the MRC's guidelines<sup>196</sup>. Pöyry downplays the possibility of needs to compensation, for example stating that "it is recommended that the developer proves by means of an additional investigation (based on data which are available) that the effect of the HPP during filling and operation is minor or even negligible"<sup>197</sup>.

Pöyry fails to consider more fully the human and social impacts of the Xayaburi dams. This is due to the lack of baseline data, which it acknowledges, and the false belief that the impacts on fisheries and sediments can be efficiently mitigated.

### *Conclusion*

Pöyry acknowledges many major and significant gaps in baseline data and in developer's assessments, plans and other documents. According to International River's review on the Pöyry report, it identifies over 40 major studies that are still needed to reach compliance<sup>198</sup>. Throughout the report, Pöyry assumes that these gaps can be filled during the early construction phase. Pöyry does not acknowledge the possibility that the impacts of the dam can really be as severe and irreversible as is feared within the scientific and civil communities, and thus that the baseline data of Mekong's ecology, biology and hydrology and of potential impacts of damming should be gathered before any construction starts. Pöyry creates a misleading presumption that the dam's impacts can be mitigated, and risks turning the Mekong Mainstream into a testing ground for new technologies<sup>199</sup>.

Despite these problems and omitting some of the MRC Guidelines<sup>200</sup>, Pöyry concludes that the "has principally been designed in accordance with the applicable MRC Design Guidelines"<sup>201</sup>. The Pöyry report lacks baseline data on which to draw such a conclusion, and by this conclusion it downplays the significance of the baseline data needed<sup>202</sup>.

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<sup>194</sup> Pöyry Report, p. 28

<sup>195</sup> Pöyry Report, p. 26

<sup>196</sup> IR Review, p.11

<sup>197</sup> Pöyry Report, p. 29

<sup>198</sup> IR Review, p. 7

<sup>199</sup> IR Review, p. 7

<sup>200</sup> *ibid.*, p. 4

<sup>201</sup> Pöyry Report, p. 14

<sup>202</sup> See also IR review, p. 8

The MRC's own technical review of the Xayaburi Dam, on the other hand, "highlights a number of areas of uncertainty on which further information is needed to address fully the extent of trans-boundary impacts and mitigation measures required."<sup>203</sup> For example, the MRC's technical review of the Xayaburi Dam emphasizes "a need for a detailed baseline study on the socio-economic impacts both in the immediate Xayaburi reach, including to the most upstream area likely to be impounded, and any transboundary areas likely to be impacted by the development"<sup>204</sup>. Without this baseline data, it is impossible to comply with the MRC's requirements<sup>205</sup>.

Pöyry's recurrent recommendation to start the construction despite knowledge gaps, to undertake additional environmental studies during the construction phase and to make subsequent adaptations during that phase also contradicts point 64 of the MRC Guidance<sup>206</sup>. This recommendation is also at odds with the precautionary principle underpinning the MRC design guidance and the values of the Sustainability Guidelines of the International Hydropower Association<sup>207</sup>. Thus even Pöyry itself fails follow the MRC Guidelines thoroughly, and by this recommends the developer to violate these Guidelines. Building now and adapting later is not appropriate for hydropower development on a shared international river of global significance, and the Mekong River should not be used as a "test site" for unproven and unverified designs.

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<sup>203</sup> MRC technical review, p. i

<sup>204</sup> *ibid.*, p. 42, see also p. 34 & 41

<sup>205</sup> IR Review, p. 8

<sup>206</sup> WWF Fisheries Review, p. 3, see also p. 9-11

<sup>207</sup> WWF Fisheries Review, p. 3



## ANNEX III

### The General Importance of addressing Pöyry Group behavior in the Mekong region

In 1999, Pöyry Energy AG's or Electrowatt-Ekono's (then a new part of the Jaakko Pöyry Group, forming the whole energy business group) business areas included thermal power, combined heat and power, hydropower, waste management, consulting and power economics, nuclear technology, oil and gas and process industries<sup>208</sup>. According to a company profile of Electrowatt-Ekono by NGO actors in 2003<sup>209</sup>, the company has been a part of many environmentally and socially dubious and disastrous damming and other energy production projects throughout its history. NGOs have criticized several of these projects and argued that these reflect low business moral and narrow know-how.

For example, in 1992, Electrowatt Engineering was commissioned by the Mekong Committee (later becoming the Mekong River Commission, MRC) to produce the environmental and financing studies for the Vietnamese 720 MW Yali Falls Dam on the Se San River, a tributary of Mekong River that flows over Viet Nam's border into Cambodia<sup>210</sup>. In an evaluation of this work it is noted that the EIA was patronizing on the local people.<sup>211</sup> Negative impacts were never fully compensated.<sup>212</sup> These events occurred before Pöyry acquired Electrowatt Engineering. Additionally it is noted that "Electrowatt's EIA ignores the impacts of the project in Viet Nam downstream of the Se San River into Cambodia. Electrowatt Engineering's consultants simply state: 'For the purpose of this study, the downstream area has been defined as an area of eight kilometres long and one kilometre wide below the dam.'"<sup>213</sup> After Electrowatt had been acquired by Pöyry in 1999 the impacts downstream in Cambodia have proved to be devastating. In May 2000, a study was produced that revealed that "approximately 20,000 people in 3,500 families in Ratanakiri Province (in Cambodia) have experienced serious ecological and socio-economic impacts as a result of the over US\$ 1 billion Yali Falls dam", that "at least 32 people have been drowned because of rainy and dry season flooding caused by the dam, and large numbers of livestock have drowned", that large amounts of riverbank have eroded and dry season gardens have been flooded, that "the water quality in the Se San River has seriously deteriorated", that "local people report that serious human health problems have resulted from changes in water quality in the Se San River, which local people bath in and drink", and that "native fish, fish habitat and riverine fisheries have been

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<sup>208</sup> Pöyry Annual Report 1999, p. 31

<sup>209</sup> Chris Lang & Nick Hildyard 2003: Dams Inc. 2: Electrowatt-Ekono, accessible via [www.chrislang.org](http://www.chrislang.org)

<sup>210</sup> *ibid.*, p. 14

<sup>211</sup> Lang & Hildyard 2003 pp.12-15: Dams Inc. 2 cites the Pöyry EIA in their attitude of the Jarai and Bana villagers to be evicted: "It is understood that an effective support is required since the affected populations belong mainly to the mountain (minority) tribes. Their knowledge regarding modern agricultural production systems is limited as well as their thinking regarding economic terms."

<sup>212</sup> *ibid.*, p. 15

<sup>213</sup> *ibid.*

severely impacted by changes in the hydrological regime and water quality”. This has further affected villagers, who are highly dependent on fish for food and income.<sup>214</sup>

The company that acquires another takes over both the assets and liabilities of the other company in the takeover. In spite of this, neither Pöyry nor Electrowatt or Electrowatt Econo has been held accountable for the EIA failing to acknowledge trans-boundary impacts, and the dramatic results that this has led to. Pöyry Plc and the Pöyry Group have had full control over financial and operating policies of the Electrowatt company since 1999, but it has to our knowledge not compensated the impacts nor being held accountable.

Pöyry Energy AG was commissioned in 2006 to serve as independent engineer during the implementation of Nam Ngum 2 hydropower scheme. Pöyry/Electrowatt was involved in the project since 1994, performing the technical studies enabling the developers to complete the Power Purchase Agreement with the Thai electricity network (EGAT). Decisions were taken to proceed with the Nam Ngum 2 Dam before the cumulative environmental and social impacts had been fully assessed for the cascade of dams being planned in the Mekong tributary Nam Ngum.<sup>215</sup> The EIA was not disclosed to affected communities and interested parties going against the Government of Lao PDR’s policy. Additionally, some reports claim that the displaced communities have been resettled to a resettlement zone with human rights impacts.<sup>216</sup> Further, the International Rivers, a campaign organization based in Bangkok, has argued that there is a close business relationship between Pöyry Energy AG and the Ch. Karnchang Public Company Limited, the Thai company in charge of construction activities at both Xayaburi Dam and Nam Ngum 2 Dam. While Pöyry was asked for a compliance review for the Xayaburi project it was still providing multiple services to Ch. Karnchang in the construction and initiation of the Nam Ngum 2 dam. The dam has only recently been operationalized. Both Ch. Karnchang, Pöyry Group and Pöyry Energy AG use the Nam Ngum 2 dam as a reference of a successful case in their corporate communications.

Pöyry Energy AG and its predecessors have been part of a number of hydropower construction processes, involving five dams in Lao PDR (Xe Pian-Xe Nam Noi, Theun Hinboun, Houay Ho, Nam Ngum 2, Nam Theun 2); in Cambodia the Battambang dam; in Thailand three (Khao Laem, Huai , Pa Thao, Nam Pong); in Viet Nam two (Yali Falls, Rao Quan). Several of these include some controversy. The company can thus be considered a major player in the hydropower sector in the past, presently and in the future. There is thus an important ground to investigate its adherence to the OECD Guidelines as there are over 70 large hydropower projects planned in the region, several with dramatic expected human rights and environmental consequences. In light of the Xayaburi case it seems as the Responsible Business Principles or their application within the Pöyry Group are thoroughly inadequate to address the irresponsibility of its actions.

The Business Principles are very ambitious, however. The Code of Conduct, which is seen as the basis of all of the business policies of Pöyry promises to “thoroughly investigate all breaches or

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<sup>214</sup>*ibid.*, p. 15–16.

<sup>215</sup>International Rivers, 22 January 2008: “Nam Ngum Hydropower Cascade Threatens Poverty Reduction in Laos”, <http://www.internationalrivers.org/resources/nam-ngum-hydropower-cascade-threatens-poverty-reduction-in-laos-3836>

<sup>216</sup>See *ibid.*

suspected breaches of this Code, taking disciplinary action and, when appropriate, initiating legal proceedings”. Pöyry describes its businesses as following the Pöyry Way, designating highest ethical standards both environmentally and socially.

“At Pöyry we are proud of our hard-earned reputation for conducting business with the highest ethical standards. We work with utmost professionalism, placing integrity and trust at the forefront. And we live by these standards everywhere we operate. Our Code of Conduct, Pöyry Way and related policies and procedures clearly define our expectations on how we work and act as an employer, company and business partner. We operate with honesty and integrity. We... expect our employees to follow the Code of Conduct and the Pöyry Way. We are committed... to operating in an environmentally and socially responsible manner. We uphold our standards with care and we expect the same from all our business partners... This holds true wherever we operate in the world. Furthermore, we recognise that business practices and environments develop and change, and as such, we benchmark ourselves to ensure we continue to raise the bar - as we have done in the past...”<sup>217</sup>

This self-presentation severely conflicts with its actual behavior, for example in this very case of the Xayaburi Dam.

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<sup>217</sup> <http://www.poyry.com/about-poyry/corporate-responsibility/business-principles>, accessed 31.3.2012