

Follow-Up Letter to Don Sahong Complaint SHM.006/6/2 -344/10/14

DATE: February, 11, 2015

TO: Human Rights Commission of Malaysia (SUHAKAM)
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 Mr. James Nayagam, Commissioner
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Dear Mr. Nayagam,

With reference to our complaint No. SHM.006/6/2 -344/10/14, filed on October 20, 2014, we wish to provide an update to the Human Rights Commission of Malaysia (SUHAKAM) on some of the recent developments pertaining to the Prior Consultation process on the Don Sahong Dam project under the 1995 Mekong Agreement.

As stated in para. 4.1 of our complaint, in September 2013, Lao PDR notified the Mekong River Commission (MRC) of its intention to construct the Don Sahong Dam,¹ which was controversial among the other MRC members, Cambodia, Thailand and Vietnam, who argued that as a mainstream dam, Don Sahong was subject to the more robust Prior Consultation procedure.²

Lao PDR eventually succumbed to international pressure and agreed to undertake the procedure for Prior Consultation in June 2014.³ However, civil society organizations, communities and other stakeholders have outlined serious concerns that the process for Prior Consultation has been flawed from the beginning.⁴ The Prior Consultation was publicly announced almost three months into the six

¹ Mekong River Commission, *Lao PDR submits notification on Don Sahong Hydropower Project* (Oct. 3, 2014), available at <http://www.mrcmekong.org/news-and-events/news/lao-pdr-submits-notification-on-don-sahong-hydropower-project/>.

² Mekong River Commission, *MRC takes Don Sahong Project discussions to ministerial level* (Jan. 16, 2014), available at <http://www.mrcmekong.org/news-and-events/news/mrc-takes-don-sahong-project-discussions-to-ministerial-level/>.

³ Radio Free Asia, *Laos Agrees to Consult with Neighbors on Don Sahong Dam Project* (June 26, 2014) available at <http://www.rfa.org/english/news/laos/dam-06262014215523.html>.

⁴ See for example, a letter of the Save the Mekong Coalition of September 10, 2014 (http://www.savethemekong.org/admin_controls/js/tiny_mce/plugins/imagemanager/files/statement/10sep2014eng.pdf) and the Save the Mekong Coalition statement of December 12, 2014

month consultation process and it has lacked adequate information, including baseline studies, comprehensive studies of the likely impacts and a transboundary impact assessment. Although the Prior Consultation process should be undertaken *prior* to any decision to proceed with a project,⁵ Lao PDR has continued with preparatory construction activities on the Don Sahong Dam throughout the process. These concerns have been echoed by Thai, Cambodian and Vietnamese governments, calling for the extension of the Prior Consultation process and the suspension of the project until further studies and consultations are conducted.⁶

At the MRC Joint Committee meeting held in Vientiane, Lao PDR, on January 28, 2015, the governments of Thailand, Cambodia and Vietnam submitted their final positions on the Don Sahong project. All three countries maintained strong opposition to the project and requested that the Prior Consultation process be extended and the project suspended pending further studies on transboundary impacts.⁷ Lao PDR rejected these requests, causing the matter to be referred to the MRC Council, the highest MRC governance body, which consists of water and environment ministers from the four member states. According to the 1995 Mekong Agreement, MRC member states should negotiate and consult in good faith, as the basis for reaching an agreement over the use of the Mekong River, and not make unilateral decisions on the use of the joint river without taking into account the rights of neighboring countries. These principles, which are supported by customary international law, have not been observed by Lao PDR.

As noted in our complaint and as clearly illustrated by the developments outlined above, the MRC framework does not provide an avenue for addressing the violations of the rights of affected communities and their members. Considering that Mega First Corporation Berhad is developing the Don Sahong project, which is likely to cause severe negative impacts to the lives, livelihoods and health of millions of people, and that it has already violated community members' procedural rights, such as the rights to information, public participation and consultation, it is becoming increasingly important that SUHAKAM conducts a public inquiry into Mega First's conduct in order to ensure that the human rights of affected communities are protected and the existing violations of their rights remedied (please see para. 2 of our complaint).

According to the UN Guiding Principles on Business and Human Rights (UNGPs),⁸ Malaysia has a responsibility to ensure that Mega First, as a Malaysian company, satisfies its human rights

(http://www.savethemekong.org/admin_controls/js/tiny_mce/plugins/imagemanager/files/statement/121214_StMstatementonregionalconsultation_Eng.pdf).

⁵Under the 1995 Mekong Agreement, project implementation, including construction, should not commence prior to consultation between MRC countries. See Mekong River Commission, *Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement* (31 Aug. 2005) at 5, n.15 available at <http://www.mrcmekong.org/assets/Publications/policies/Guidelines-on-implementation-of-the-PNPCA.pdf>.

⁶ See for example, Laignee Barron, *Vietnam Slams Don Sahong*, The Phnom Penh Post (Dec. 25, 2014), available at <http://www.phnompenhpost.com/national/vietnam-slams-don-sahong>.

⁷Mekong River Commission, *MRC holds Special Session on Prior Consultation of Don Sahong Hydropower Project* (Jan. 28, 2015), available at <http://www.mrcmekong.org/news-and-events/news/mrc-holds-special-session-on-prior-consultation-of-don-sahong-hydropower-project/>.

⁸ Office of the High Commissioner on Human Rights, *UN Guiding Principles on Business and Human Rights: Implementing the Protect, Respect, Remedy Framework* (2011), available at: www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

obligations, including in its overseas operations, through adequate legislation, policies, and adjudication.⁹ Nevertheless, in its recent dismissive response to the Don Sahong issue, raised in the Malaysian Parliament by the MP Mr. Charles Santiago, the Minister of International Trade and Industry stated that the Malaysian government would not adopt measures in order to ensure that Malaysian companies behave responsibly in their business operations abroad. Furthermore, in his reply, the Minister stated that if the MRC decided that the project did not harm the environment, then Mega First could proceed with its operations. However, as stated above, the Prior Consultation process has resulted in strong opposition against the Don Sahong project exactly because Thailand, Cambodia and Vietnam governments did not agree that the project will not cause environmental harm. This should send a clear signal to the Malaysian government that Mega First is involved in a highly controversial project of significant environmental and social concern as has been expressed by the affected riparian countries. It should also be noted that the MRC framework does not provide for a compliance mechanisms should Lao PDR unilaterally decide to proceed with the project (as is the case with Don Sahong).

We reiterate that Mega First has human rights obligations independent of those of Lao PDR or Malaysia. Mega First has failed its obligation to respect human rights as stipulated by the UNGPs, including obligation to avoid infringing on the human rights of others and to address adverse human rights impacts with which it is involved.¹⁰

Both Lao and Malaysian laws require environmental impact assessments that include public participation, access to information, consultation, and release of documentation for projects with likely significant environmental impacts,¹¹ such as the Don Sahong project. The further Mega First is allowed to progress with the construction without any questions being raised as to its conduct, the harder it will be to protect affected peoples from harm. We therefore respectfully request that SUHAKAM publicly accepts the case and begins a public inquiry in order to prevent further irreversible harm to communities.

Yours sincerely,

Community Resource Centre



S.R. Polk

Ms. Sor Rattanamanee Polkla

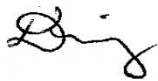
⁹ UNGPs, Principles 1 and 2.

¹⁰ UNGP Principle 11.

¹¹See Malaysian Environmental Quality Act of 1974, sections 16(b) and 34A, and Lao Environmental Protection Law of 1999, Article 8(5).

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