



Letter Seeking Appointment to Lodge a Complaint

DATE: 3 September, 2014

TO: Human Rights Commission of Malaysia (SUHAKAM)
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1.) Introduction

We are writing to inform SUHAKAM that EarthRights International (ERI), NGO Forum (Cambodia) and Northeastern Rural Development (NRD) (Cambodia) intend to submit a complaint on the behalf of communities in Cambodia and Thailand against Mega First Corporation Berhad (“Mega First”) with respect to its ownership and management of the Don Sahong Hydropower Project (“Don Sahong Project”). The Don Sahong Project imperils the food supply of thousands of vulnerable people along the Mekong River. Pursuing this project, Mega First has: inadequately investigated the likely impacts; provided inadequate detail on how it will mitigate those negative impacts; and has provided little to no opportunity for those people that will be affected to participate in project decision-making. Mega First is a Malaysian company and we therefore request SUHAKAM to help ensure that Mega First satisfy its obligations under human rights and related environmental laws; including: to conduct effective human rights due diligence; to minimize unavoidable negative impacts (if the project continues); and to provide an opportunity for affected communities to participate in decision-making relating to the Don Sahong Project.

We greatly appreciate SUHAKAM’s time and consideration of this matter. But because Mega First is pushing forward aggressively with construction plans (Don Sahong is to be commissioned in 2016), it is imperative that a resolution is reached soon. Affected communities will not be able to exercise their participation rights once construction is complete (and no remedy will then be able to restore that right to meaningfully participate). We anticipate submitting a formal complaint in the second half of October 2014 and are ready to begin mediation with Mega First at any time.

2.) Project Background

In 2006, Mega First entered into negotiations with the Government of Lao PDR (“GoL”) to build the Don Sahong Dam. That project is a proposed hydroelectric dam – of between 30 and 32 meters with a generating capacity of 260 MW – on the Hou Sahong channel of the mainstream Mekong River, located between Don Sahong and Don Sadam Islands, Champassak Province, Lao PDR. Mega First has already funded a feasibility study and an Environmental Impact Assessment (EIA), which GoL has approved and finalized in 2013, despite it being flawed and grossly inadequate. The

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construction of the Don Sahong Dam is already underway, despite strong opposition from neighboring countries, concerned by the transboundary environmental and social impacts caused by the project and the lack of transboundary EIA.

3.) Expected Project Impacts

The Hou Sahong channel – which will be fully blocked by the Don Sahong Project – is the only channel of the Mekong that provides year-round upstream and downstream fish passage past the Khone Falls area. By blocking fish passage, the Don Sahong Project creates an unacceptable risk to populations (in Laos, in Cambodia and in Thailand) that depend on migratory fish for their health, nutrition, lives and livelihoods.¹ The Don Sahong Project’s design and supposed mitigation measures do not adequately account for the substantial fish kill that can be expected; indeed, almost all of the proposed efforts to prevent dramatic reductions in fish populations are untested/unproved, completely lacking in engineering specifics, or proven ineffective.²

The fish kill that is the likely result of the Don Sahong Project will make an already dire situation even worse. The Mekong communities that are likely to bear the brunt of the negative impacts of the Don Sahong Project already endure a fragile existence. For example, “in Stung Treng Province, northeastern Cambodia, the provincial government’s Department of Planning reported in 2003 that 45% of children under five are underweight ...”³ Similarly, the World Food Program “found that Laos’ rural population is experiencing serious malnutrition problems, with 50 percent of children being chronically malnourished.”⁴ These vulnerable populations rely on fish, which in many parts of the region, “make[s] up over 80 percent of the animal protein the local populations consume.”⁵ It is also notable that many of the people that live along the Mekong – and who will be affected – are indigenous peoples.⁶ Not only are their health, nutrition, lives and livelihoods threatened by the Don Sahong Project, but so is their culture, traditions and protected way of life.

There is little doubt that any project that will impact fish populations of the Mekong should be undertaken with the utmost care. But, the Don Sahong Project, which completely blocks the *only* viable fish channel during dry season, involved inadequate study of: (1) the ecology of the Mekong; (2) the migration patterns of fish species; (3) the demographics and dependence on fish of Mekong communities; or (4) the realistic probabilities that proposed mitigation measures can actually meet the task of preserving existing fish populations.

¹ Professor Ian Baird, a Mekong River fish expert, has shown that many of the fish that Mekong communities rely upon are highly migratory fish. Once the Hou Sahong channel is blocked many such fish will be unable to complete their migration cycles and/or die in attempting the passage. Ian G. Baird (2011), *The Don Sahong Dam*, Critical Asian Studies, 43:2, at 221 (hereinafter “Baird 2011”).

² See generally, World Wildlife Fund, *Summary of Scientific Reviews from Three International Fish Passage Experts on the Don Sahong Dam EIA and Technical Reports Related to Project Design and Mitigation Measures* (Feb. 2014) available at http://awsassets.panda.org/downloads/wwf_scientific_review_by_3_fish_passage_experts_finalrevised12mar.pdf.

³ Baird 2011 at 227.

⁴ *Id.*

⁵ *Id.* at 213.

⁶ For example, in Boeung Char commune in Sambor district, Kratie province, the population is predominantly indigenous Kuy (Kuoy). In Dom Rea village, more specifically, 83% of the 393 villagers are Kuy.

4.) Human Rights Implications

As the Don Sahong Project imperils the lives, health and livelihoods of Mekong communities, so does it violate the affected communities' human rights. The human rights to life, health and livelihood are recognized universally. And, the Don Sahong Project – if it continues as planned - will threaten each. In part because such harms are so serious (and often irreparable), international law demands that project developers honor supplementary procedural rights and duties, including:

- The rights of affected communities to receive information about projects that will affect them and to meaningfully participate in project decision-making.
- The duty of a project developer to obtain the “free, prior and informed consent” of indigenous peoples *before* undertaking projects that will affect them, threaten their cultural survival or impact their lands.
- The duty of a project developer to study, understand and publish all of a project's substantial negative impacts on the health, livelihood and environment. As well as a duty to effectively mitigate – and where impossible – compensate for those negative impacts.

While the Don Sahong Project *will* result in the violation of substantive human rights, it *already has* violated the procedural rights of affected communities in Cambodia, Lao PDR and other Mekong nation communities. These violations include:

- Mega First's inadequate assessment of the social and environmental impacts of the Don Sahong Project. The existing assessment, for example, includes no, much less comprehensive, analysis of: what fish populations communities depend on; for what purpose such fish are used; the migratory patterns of those fish; how those fish react to migratory disruptions.
- Unproven, non-specific and aspirational mitigation steps. Mega First, at best, has identified what steps it will take. But, it has offered no support for how and why those steps will likely be effective.
- An almost wholesale failure to provide project information to affected communities and a similarly unimpressive effort to engage with communities about the project. Certainly, Mega First has not obtained the “free, prior and informed consent” of the indigenous peoples in Cambodia that will be affected.

5.) Mega First's human rights obligations

That Mega First is a Malaysian corporation, building a dam in Lao PDR, does not free it from its duties to the downstream communities in Cambodia (nor is it free from its duties to Lao, Thai and Vietnamese communities). It is a well-accepted part of international law that liability exists for trans-boundary harms.⁷ Indeed, the International Court of Justice made clear that a trans-boundary environmental impact assessment is a requirement under customary international law for projects likely to have significant impacts.⁸

⁷ See Oppenheim on International Law (1912: 243-44) Chapter Eight p. 220 (“[a] State, in spite of its territorial supremacy, is not allowed to alter the conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State.”).

⁸ *Pulp Mills on the River Uruguay*, 2010 ICJ Reports ¶ 204.

Moreover, corporations, like Mega First, may be bound by (and liable for violations of) customary international law.⁹ According to the UN Guiding Principles on Business and Human Rights, the “responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate” and “it exists independently of States’ abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations”.¹⁰

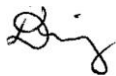
Here, affected communities cannot depend on Lao PDR to independently (or in conjunction with Mega First) protect their human rights. SUHAKAM, however, is uniquely capable of influencing Mega First. States, like Malaysia, have an obligation to “protect against human rights abuses within their territory *and/or jurisdiction by third parties*, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse”¹¹ (emphasis added).

We are, therefore, calling on SUHAKAM and Malaysia to help us ensure that Mega First meets its human rights obligations with respect to the Don Sahong Project. What we hope for is: (1) an independent investigation of the likely impacts of the Don Sahong Project and upstream and downstream Mekong communities; (2) for SUHAKAM to help bring Mega First into contact with affected communities in order that the Don Sahong Project comply with international human rights standards; and (3) that dam construction is ceased until proper impact assessment is conducted by Mega First. Although SUHAKAM would be addressing a transboundary human rights violation case for the first time, other human rights commissions in the region, most notably Thailand’s National Human Rights Commission, have already accepted jurisdiction for complaints involving transboundary corporate accountability.¹²

We would like to formally submit our complaint in mid-October. Representatives from affected communities in Cambodia and Thailand will attend the complaint submission. They would greatly appreciate the opportunity to personally speak with the commissioners about their concerns. If possible, we hope that the commissioners will be available to receive the complaint and hear from community representatives sometime between October 16 and October 31, 2014, as well as allow for the hearing to be attended by the media and audio-visually documented.

Looking forward to hearing from you soon.

Yours sincerely,



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⁹ See William S. Dodge, *Corporate Liability Under Customary International Law*, 43 Georgetown J. Int’l L. 1045 (2012).

¹⁰ Guiding Principles on Business and Human Rights, HR/PUB/11/14 at 13.

¹¹ *Id.* at 4.

¹² National Human Rights Commission of Thailand, *Findings of the Subcommittee on Civil and Political Rights on the Kob Kong Sugar Cane Plantation Case in Cambodia*, July 25, 2012.