

On behalf of the Complainant; Siemenpuu Mekong Group & Friends of the Earth Finland

16 April 2013

To: Ministry of Employment and the Economy
Committee on Social and Corporate Responsibility

Ref: Specific Instance about Pöyry Group services in the process of the Xayaburi hydropower project in Lao PDR

Complainant's response to the statement given by the Ministry for Foreign Affairs (Jan 28, 2013) and to Pöyry's response (Feb 15, 2013)

The Complainant has discussed this statement and Pöyry's response to it in further detail in the document submitted to the Ministry of Employment and the Economy (MEE) on April 3, 2013.

The statement by the Ministry for Foreign Affairs (MFA) raises many key concerns with regards to the Xayaburi hydropower project. These concerns are supportive of the Complainant's view. According to the MFA, there are many scientific concerns of the potential impacts of Mekong mainstream dams. The Strategic Environmental Assessment (SEA), the most comprehensive study to date on the lower Mekong river, ends with a concluding recommendation of deferring all mainstream dams for ten years. This recommendation conflicts with Laos' plans to proceed with the project quickly. The MFA states that "Finland has emphasised that the dam projects should not move forward before the cumulative effects of the dams planned for the catchment area have been comprehensively assessed".

The SEA has concluded that there is a serious lack of baseline data and experts have argued that there does not exist proven fish pass technology for conditions comparable to the Mekong mainstream. In line with the Complainant the MFA states that "the MRC considers problematic Pöyry's proposal for the surveys, monitoring, and modelling that are to be performed during the construction. In the opinion of the MRC secretariat, it would be better for these to be carried out before construction commences, instead of simultaneously with construction... The MRC secretariat states in its report that, even if all of Pöyry's recommendations were to be incorporated into the project, this would not answer all the concerns of the countries – especially the concern that no construction should be carried out on the trunk of the river before adequate investigations have been performed."

The complainants have raised the concern of potential environmental and human rights impacts. MFA confirms that "it is...reasonable to expect that, in the absence of appropriate preventive or mitigating measures, the possibility of an adverse impact on human rights does exist."

The MFA states that it has "been unable to assess the extent to which Pöyry plc has fulfilled and/or neglected the due-diligence obligation for companies, the obligation of adequately assessing the impact on human rights, or the obligation to consult possible local victims of human-rights violations." To demonstrate that Pöyry has fulfilled these obligations should reasonably lie with Pöyry. Thus, the MFA "proposes that, in connection with further processing of the matter, the Committee on Social and Corporate Responsibility request Pöyry to provide additional reports related to the questions mentioned above." This is in line with the complainants demands and concerns, and forms a basis for any meaningful dialogue.

As demonstrated in the Complaint and in the MFA statement, the project and its impacts include many scientific, social and environmental uncertainties. The OECD guidelines recommend requires taking a precautionary approach. Pöyry has not demonstrated that it has taken all the risks into account adequately, which is further indicated in the MRC review on the Compliance review.

Comments on the MFA statement

MFA states that there are several sections in the 1995 Mekong Agreement that are “open to interpretation, which has also resulted in disputes between the parties”. However, a legal analysis suggests that MFA statement on the interpretation of the 1995 Mekong Agreement is somewhat inadequate¹. This key point is discussed in further depth in the document submitted to the MEE on April 3, 2013 (p. 5-6 and 10-11). Furthermore, even though there is disagreement on how to interpret the 1995 Mekong Agreement, international law gives quite strong guidance on how to understand the 1995 Mekong Agreement, as it is an agreement bringing international law into the context of the Mekong region, which aims to make sure international law is respected in the development and management of a transboundary water system.

The Complainant argues to have been able to demonstrate in the complaint and in the document submitted to the MEE on April 3, 2013, that Pöyry’s services are wider in scope than the mere Compliance Review. The Pöyry services are not only technical, but form an important service and tool for the Lao government in proceeding with the project fast and against the 1995 Mekong Agreement.

Complainant’s reaction to Pöyry’s response to the MFA statement

Pöyry likes to use its Terms of Reference (ToR) for the Compliance Review as evidence that it had no role in proceeding with the Xayaburi dam. The following summarizes some of the problems in concentrating too much in the content of the ToR.

Firstly, in its response to the MFA statement, Pöyry actually contradicts itself. Pöyry says that its task was only to review the project design prepared by another company. But then if one looks at the scope of work, as described by Pöyry, it goes far beyond a simple desk review of the existing design documents. Pöyry describes its work as advising Laos on which member countries' recommendations "should be" taken into consideration. It advises Laos on finding "technical solutions". It is supposed to "propose mitigation measures" to Laos. Furthermore, Pöyry does not mention in its statement that it has taken on a far greater role in the project, now that it is the Government of Laos' chief engineer.

Secondly, in investigating the breaches of the OECD Guidelines, one must concentrate in the whole picture of Pöyry’s actions rather than the ToR only.

1. Pöyry produced a product, consisting of its compliance review document and any other associated advice that it gave to Laos.
2. This product directly contributed to the diplomatic dispute at the MRC because Laos relied almost entirely on it to justify moving ahead with the Xayaburi construction despite opposition from neighbouring countries and in violation of the 1995 Mekong Agreement. This is evidenced by

¹ Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement, by Kirk Herbertson, International Rivers, January 2013. This analysis is submitted to the MEE on April 3, 2013, and can also be read at http://www.internationalrivers.org/files/attached-files/intl_rivers_analysis_of_mekong_agreement_january_2013.pdf

- a. the letter that Laos sent to Thailand that led to the signing of the power purchase agreement,
 - b. the letter that Laos sent to Ch. Karnchang that led to continuing construction,
 - c. the presentations and site visits that Pöyry led to convince foreign governments that the project was safe,
 - d. newspaper articles in the Vientiane Times that Laos wrote that relied almost entirely on Pöyry to justify moving forward with construction (see the Complaint and the new document submitted on April 3, 2013)
3. Pöyry knew that its products were being used to justify moving forward with construction, despite the diplomatic dispute at the Mekong River Commission, and despite widespread criticism of Pöyry's findings by scientific experts and the MRC secretariat.
 4. Pöyry took no actions to correct the ways that the Lao government used and portrayed its products.
 5. Pöyry indeed had a conflict-of-interest in concluding the construction could move forward, because it had been promised further work as the Lao government's engineer
 6. This is likely to result in significant environmental damage and human rights violations in the future. It has already resulted in governance/procedural rights violations, because it has undermined cooperation under the 1995 Mekong Agreement. This has also undermined Finnish development policy in the region.

All of this amounts to wrong-doing, and the contents of the ToR, which Pöyry focuses on, are irrelevant to this.

Some confusion in Pöyry's statement demand further reaction. Firstly, it does not matter if Pöyry is the lead developer or the decision-maker of the project; in the OECD Guidelines, it is for example stated that the companies are expected to "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" (see the Complaint, p. 31-33).

Pöyry also once more claims that the PNPCA "had already completed at the time when the GOL appointed Pöyry to perform its technical review". However, MRC's official position in April 2011 of the state of the PNPCA was that "there is still a difference in views from each country on whether the prior consultation process should come to an end," and that the MRC's Joint Committee "agreed that a decision on the prior consultation process...be tabled for consideration at the ministerial level, as they could not come to a common conclusion on how to proceed with the project." Therefore, Pöyry should have acted with due diligence and could have chosen not to become involved in the project at that point in time.